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ABSTRACT

This study examines the laws of Arizona, California, Florida, Massachusetts, and New York in an attempt to determine who has what kind of authority to control the curriculum of public and private schools in each state. The five states studied were selected to represent different degrees of centralization in the control of school curriculum. The laws of each state are analyzed using a common framework that facilitates analysis of the relative authority of state legislatures, state boards of education, chief state school officers, state courts, local boards of education, superintendents, principals, teachers, unions, parents, students, and citizens. Also described is the content of the school curriculum in each state as prescribed by state statutes, regulations, and court rulings. Following a fairly extensive introductory chapter, a separate chapter is devoted to the analysis and discussion of curriculum control in each state. In the final chapter, the authors present a comparative analysis of the laws in all five states and offer their recommendations for change. (Author/JG)

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Authority to Control the School Curriculum:

An Assessment of Rights in Conflict

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Authority to Control the School Curriculum:

An Assessment of Rights in Conflict

PREFACE

Pursuant to a grant issued by the National Institute of Education, we have undertaken the study of the laws of five states as that law bears upon the control of the curriculum in the public and private schools of those states. The states are: Arizona, California, Florida, Massachusetts and New York. These five were selected after a review of the statutory code of perhaps twenty states in light of several criteria. First, we wanted to obtain states that ranged along a continuum measured in terms of the extent of state control over curriculum. Under this criterion Arizona and California represent fairly centralized states; New York falls in the middle of the spectrum, and then come Florida and Massachusetts. Second, we were interested in states with different sociological backgrounds because we hypothesized that these differing conditions would give rise to different problems with regard to the curriculum in the schools, which in turn would provoke different legal solutions to those problems. Taken together, these two criteria pointed toward a sample of five states which would be markedly different from each other. The comparisons between the states hopefully would be a source of insights with regard to the law and the control of the school curriculum. Just as we sought states that were different from each other, we applied a third criterion, namely, that the states selected should be as much as possible representative of other states in the union--the states should reflect problems and approaches that could be found in other states. In this way some of the findings of the report could be generalizable if appropriate caution were taken.

The study of these five states began with the assumption that there were a dozen possible claimants to authority to control the schools' curriculum: the state legislature, the state board of education, the chief state school officer, the state courts, the local school boards, local administrators, teachers, teachers' unions, parents, students, and taxpayers. And, in the private sector, we assumed the private school and parent also claimed a right to control the curriculum in the private school. Each of these claimants in the public and private sector we assumed could establish at least a plausible case for having an effective voice at some point in the decision-making process dealing with the school's curriculum. Whether each claim should be recognized and to what extent it should be recognized raises one of the most difficult questions of governance of the schools. This study was undertaken to examine how five different states have responded to these claims. In other words, the study was intended to provide an analytical picture of the allocation of authority to control the school curriculum in each of the five states. Additionally, each chapter was to outline the substance of the school program required in each of the states as imposed by state law and regulations.

Several purposes are served by the study. First, the study establishes a framework for analyzing state laws on education with regard to the allocation of authority. That framework is used in each of five chapters without extensive comment upon the conceptions underlying the framework. In the introduction to the report, however, we elaborate on the framework. It is hoped that the framework will be of use to those who wish themselves to study the laws of other states.

A second purpose of the study was to enhance our understanding of the present state of the law with regard to the allocation of authority to control the school curriculum. We illuminate (i) some of the alternative

patterns as to how authority has been allocated among the claimants; (ii) the techniques and devices used for establishing the shared authority to control the curriculum; and (iii) the mechanisms for resolving disputes over the curriculum. Recommendations on these questions are to be found in the last section of the report.

Third, the report provides an insight into the extent to which control of the curriculum has been left to the discretion of the political and administrative processes and the extent to which it has become subject to the control of binding rules and regulations. Increasingly the establishment of curriculum policy is being undertaken at the legislative level through the adoption of laws which constrain the discretion of the other participants in the policy-making process.

Fourth, it was hoped the study of the politics of curriculum formation would be improved if political scientists first came to an understanding of the legal framework in which that political process went forward. This study establishes an approach for understanding that framework and should help political scientists become more sensitive to the role law plays in shaping the political processes and the extent to which the political process shapes the law.

Fifth, the study was designed to contribute to the definition of the domain of curriculum law. We hope to show that curriculum law is basically a body of law concerned with the allocation of authority and secondarily a body of substantive principles spelling out what the content of the curriculum should be.

INTRODUCTION

In reading the five studies it is important to understand what they are and are not. These are legal studies which attempt to describe and analyze the authority of the various participants in the system established for formulating curriculum policy. Occasionally the studies reflect upon the actual political processes in the state as they occur under state law. The study of Arizona contains fairly extensive political commentary which is there to show how the centralization of authority in a state with poorly articulated rights and duties can result in excessive politicization of curriculum decision making. Basically, however, these studies are analytical-descriptive studies of the legal structure, not of the political processes within the states.

It is also important to note that these studies concentrate upon state law to the exclusion of U. S. Constitutional law. Only occasionally are references made to Supreme Court opinions, and the reader should be aware that the U. S. Constitution provides another source of law affecting both the allocation of roles and the scope of authority of governmental officials. For a discussion of some of the U.S. Constitutional issues with regard to curriculum see the separate essay which was produced under the same grant as this study of state law, entitled "Constitutional and Philosophical Perspectives on Political Education in the Public Schools," by Tyll van Geel.

As a guide to the reading of the five studies, the following comments are offered. Each study begins with a discussion of the state's constitution as it bears upon the allocation of roles for controlling the curriculum. A state constitution establishes the framework within which the legislature acts in further designing the governing system for education generally and

for controlling the school curriculum in particular. In this regard it is important to note that it is primarily the legislature which allocates the roles to the claimants for authority. Thus, the bulk of each study is an assessment of the legally defined role and authority of the various claimants listed above. This concern of each study is reflected in the organization of the studies: each study is broken down into sections dealing with state officials, the courts, local school boards, local administrators, teachers, unions, parents, students and taxpayers. Each study also includes a discussion of state control of the curriculum of the private schools in the state.

Some refinements in the approach taken need to be added at this point. It is not possible to discuss, for example, the authority of the state board of education, without also understanding the authority of the local boards of education. Authority to control the curriculum in most states is shared among many participants and each may play a different role in reaching a final authoritative decision. Thus, the local board may enjoy the initiative to propose a new course, but the state board may have the right to approve or disapprove that proposed course. In short, we are dealing with a system of interrelated participants and understanding the authority of one depends upon understanding the authority of other participants. Another example underlining the importance of this interrelationship is the interrelationship between the courts and such other units of government as the state and local boards. The scope of authority of the state and local boards is importantly defined by the courts, but how much of a constraint the courts represent depends upon the rules the courts follow in interpreting statutes and assessing whether these other units of government have abused their discretion.

A. Types of Authority

Understanding the pattern the allocation of authority takes in a state depends upon an understanding of several doctrines and how they affect the allocation of authority in the state in question. To get to these doctrines it is necessary to draw several distinctions with regard to different kinds of authority that are found in the states. First, there are certain decisions and rules that only the state legislature is competent to make. Consequently the power to enact this kind of policy or law may not be delegated by the legislature. A good example of such a power is the power to formulate criminal laws. The power to decide whether or not there will be publicly supported schools is another power that apparently cannot be delegated consistently with the constitutions of most states. A second sort of power is one which may be delegated to some bodies and once having been given the power, the delegatee, e.g., local school district, may take the initiative on the subject. At any time, however, the state may withdraw the power or preempt it. A third sort of power is that which local districts might be able to exercise even without a delegation of authority from the state legislature. This sort of power might be termed "inherent" power which is established by the argument that if there is a local school district it must necessarily have this power to operate. However, the power inherent in the local district is subject to legislative constraint and even preemption. In the studies undertaken here no clear indication was found that any local districts in any state had this sort of authority. All local district authority was of the second kind discussed above. However, in one state, Florida, the possibility exists of interpreting the state constitution as creating inherent authority within local districts which is subject to legislative control and manipulation. The California

State Constitution, Article 9, Section 14, Paragraph 2, however, indicates the extent to which school districts in California must rely on obtaining all their authority from the state legislature: "The Legislature may authorize the governing boards of all school districts to initiate or carry on any programs, activities, or to otherwise act in any manner which is not in conflict with laws and purposes for which school districts are established." A fourth kind of authority which, it seems safe to say, no school district in the country enjoys, is a constitutional grant of authority which the legislature may not regulate, limit or withdraw. Typically only certain municipalities in certain states enjoy such an "inherent right of local government." Sometimes one is tempted to say, however, that legislative grants of general authority have been so broadly interpreted that in effect an inherent right of self-government has been created by the legislature. In Massachusetts prior to a spate of legislative activity in 1965, so much discretion was found within the general enabling acts that it was tantamount to the establishment of an inherent right of local self-government. Since 1965 the legislature has been busy adopting various kinds of laws dealing with racial imbalance in the schools, special education and bilingual education, hence a portion of that legislatively created inherent right of self-government has been withdrawn. This development only goes to underscore that what the districts in Massachusetts enjoy is not a true inherent right of self-government.

B. Delegation

An ability to understand and analyze the second type of authority described above depends upon an ability to understand and work with several interrelated legal doctrines and concepts. These concepts and doctrines are briefly introduced here to assist in the reading of the individual

studies of the five states. We begin with the doctrine known as the delegation doctrine which states that the legislature may not delegate its legislative authority to other units of government. The legislature may delegate something less than its actual legislative authority, but its own authority which has been given to it by the state constitution may not be given away. To give its authority away is an abdication of responsibility that has been placed in the hands of the legislature as the most representative body in the state. Having been given the task of legislating, it and no one else must exercise the power. Anything less shifts control of policy to something other than the state-wide community which has been deemed the most appropriate community for controlling basic educational policy in the state.

The doctrine against the delegation of authority, thus, establishes, in theory, a limit on the extent to which control over education in the state may be decentralized politically or administratively. Basic or "legislative" decisions, in other words, may not be turned over either to other elected units (e.g. state board of education, local boards of education) or to administrative officials who may be appointed (e.g. state board of education, chief state school officer, local superintendents).

Other related doctrines affect the possibilities for decentralization. First, there is the prohibition against the delegation of public authority to private groups. In brief, this doctrine means that delegations of authority will be struck down as unconstitutional when the presence of certain factors create the possibility for an abuse of power so great it cannot be tolerated. The factors looked for are the following: (a) The kind of power delegated -- is it a power to coerce others and to do real injury to them; (b) The scope of the discretion -- are there standards to guide the exercise of the power;

are their procedures which must be followed which tend to protect individuals; is there a mechanism for reviewing the exercise of the power so that individuals will once again be protected; are those who exercise the power accountable to elected officials; (c) The nature of the group granted the power when considered in the light of the authority granted to it -- how self-interested is the group in terms of the power granted? For example, a rent control scheme which delegated the power to control rents to the landlords of the city would involve the delegation of coercive power to a group that had considerable self-interest in the power granted to them. (d) The delegation of other powers to the group. Groups which have been delegated a broad range of powers over a variety of matters -- rents, licensing of cabs, zoning -- will be pushed into a kind of decision-making process in which those who form a majority on the rent issue will be forced to bargain with those others which form the majority on the zoning issue. This bargaining will serve as an internal check on the group diminishing the chances for a coherent permanent majority abusing its power.

A further restraint on the decentralization of authority are the limitations on the sub-delegation of authority. Subdelegation occurs when an agency which has itself been the recipient of delegated authority delegates its authority to another body. Whether an agency may subdelegate depends upon whether the legislature has given it the authority to sub-delegate and whether the sub-delegation itself is consistent with the state constitution.

(The precise content of these delegation doctrines will vary from state to state, hence each state study takes up these issues again.)

C. Scope of Authority and Presumptions

Once it is decided that a grant of authority can withstand challenges

based on one or another of the delegation doctrines, then the question arises as to the scope of the authority granted. (Note, that one can avoid having a law struck down as an unconstitutional grant of authority by narrowly construing it so that it does not amount to the grant of "legislative" authority. Putting the point differently, in order to avoid having to strike legislation down under the delegation doctrine, a court may construe that authority narrowly to avoid reading the statute as granting "legislative" power.) An important part of the analysis in the studies of state law is an assessment of the scope of authority of the various participants in the decision-making system for curriculum. Thus, we ask what is the scope of authority granted by the various statutory provision to the state board of education, chief state school officer, local boards of education etc. The state studies importantly are an exercise in statutory interpretation.

One important assistance one looks for in deciding the scope of a grant of authority, is whether there exists in the law of the state a presumption with regard to the permissiveness or restriveness of the statutory code. If there exists in state law a presumption that a statutory code is restrictive, that means we must assume an agency lacks the authority to do "X" unless that authority has been expressly granted to it by the legislature. When one works under a presumption that the code is permissive we need not find an explicit grant of authority in order to conclude that the agency has the power. Instead, following certain canons of statutory construction, one can imply the existence of an authority to do "X" from a grant of authority which may make no explicit reference to the authority in question.

Now there may in a single state be both a permissive and restrictive presumption at work; a permissive persumption may be applicable to grants of

authority to state agencies while a restrictive presumption may be applicable when interpreting grants to local authorities, or vice versa. This point can be illustrated by the following diagram.

	State Permissive	State Restrictive
Local Permissive	1	2
Local Restrictive	3	4

The diagram is to be read in the following way. A state whose grant of authority to both the state and local educational agencies is to be read in light of a permissive assumption falls into the first quadrant, and so on.

Analyzing a state's laws in these terms can assist in interpreting the scope of specific statutory provisions. For example, assume the legislature has delegated authority to both the state and local boards to control the curriculum in the public schools. To the state board is given authority to establish minimum standards and to the local district is given the authority to prescribe the course of study. A first reasonable guess as to the scope of the provisions would be that they fall either into quadrant 2 or 3 as it is in these quadrants that one finds the most rational or orderly relationship between state and local levels of government. Assuming the legislature attempted to establish an orderly relationship in which the relationship of state and locality was reasonably well defined these are the likely choices a legislature would make. States that fall into quadrant number 2 would have established the following

relationship. A certain quantum of authority expressly would have been given to the state and that authority could not be expanded through judicial interpretation but only by legislative amendment of that authority. However, as regards the local unit of government the grant of authority would be expandable through a generous interpretation of the grant of local authority. Now it may be that the express grant of authority to the state was considerable thereby creating at first blush a centralized system for controlling education. But over time the system might become less centralized as ways are found to interpret the local grant of authority so that it is expanded without coming into conflict with state authority. Of course, the initial grant of authority to the state might have been meager, thus over time as the grant to the localities is given an ever broader interpretation, the state would become increasingly decentralized.

A state that was placed in quadrant three might have a different historical development. Here the legislature might have started out with a general grant of permissive authority to the state agencies and a generous grant of explicit-restrictive authority to the localities. The system would appear at first to be decentralized but as the authority of the state is given a broader and broader interpretation, the relationship would change and the system would become increasingly centralized. Of course the initial grant of authority to the locality might have been narrow and, thus, the system would have started out as a centralized system and over time it would become increasingly centralized as broader interpretations are given of the state's permissive authority.

States that fall into quadrant number one could develop in a number of directions without legislative intervention to change the relationship between state and locality. This state might become either increasingly decentralized

or increasingly centralized. If the state agencies restrain themselves and broad interpretations are made of the local authority, the state would become increasingly decentralized. However, if the state agencies exercise their authority with increasing sweep, the state agencies would preempt local authority and the state would become increasingly centralized.

Those states which fall into quadrant four might start out either centralized or decentralized and would not change over time, absent legislative intervention. A danger exists under this arrangement which does not exist with regard to the other quadrants: if the legislature has not expressly granted authority to either the state or the locality to deal with a problem, then the possibility exists of a vacuum of authority having been created with neither the state nor the locality being able to deal with the issue.

What evidence does one look for in deciding whether a permissive or restrictive assumption is at work? Sometimes the legislature will declare explicitly that a statutory code ought to be liberally construed suggesting that a permissive assumption should be used. Of course, other indicia may work to counterbalance this inference. For example, if the enabling act is marked by extensive detail and the precise specification of powers and duties, such a code is usually interpreted with a restrictive assumption. One can, however, safely assume a code is to be viewed permissively if the grant of authority is in general and broad terms and if the legislature has declared that the agency has all implied powers necessary to carry out its purposes. Similarly, a legislative statement that a local district has all authority not in conflict or inconsistent with state law is suggestive of a permissive code.

Apart from the question of presumptions, the interpretation of the scope of authority of an agency is also influenced by the "plain meaning" of the statutory language; and the purposes for which the agency was established. One

might interpret a grant to local authority more narrowly if it were thought that to interpret the legislation broadly would lead to diverse behavior among the districts on an issue the legislature would seem to have preferred greater uniformity. Finally, a narrower interpretation of authority might be warranted if the authority touches upon a fundamental interest or right; in that way greater protection is afforded the individual. In this regard it is worth noting that courts in several of the states studied as part of this project have moved toward an interpretation of their own state constitutions which establishes a right to an education.

D. Preemption

When we are dealing with -- as we are with public schools -- the second type of authority discussed above (see Section A. Types of Authority), the possibility exists of the legislature or a state agency preempting an area. For example, if the legislature adopts an extensive code dealing with student discipline that area may be preempted and local districts may be wholly constrained from adopting any policies whatsoever in this area. Preemption can also occur when a state agency promulgates regulations which have the force of law. In any event, preemption is another way of going about trying to argue that a local district lacks authority to deal with a certain question. Hence, an attack on local district authority can take place in terms of a charge of improper delegation; a failure of the legislature to delegate the authority in the first place; an abuse of discretion; and preemption, not to speak of the various constitutional arguments relying on the federal or state bill of rights.

Deciding whether the state has preempted is no easy matter as many factors must be taken into account in reaching a conclusion. One important element in the analysis is revealed by asking the same question we asked when discussing the

problem of delegation: is this a subject that, if it is to be under governmental control, should be controlled by the state-wide community as represented in the state legislature? If so, then we can conclude that when the state legislates, it did in fact preempt the area. (Note, if the state does not totally preempt the subject but explicitly delegates some control to a local agency, this delegation itself may be deemed improper absent constraints on the discretion of the local authority -- constraints which assure that all the authority given away is only "administrative" authority.)

We might try to determine if the state preempted the subject by asking if the area in question traditionally has been in the control of the state legislature? In education, there are few subjects which traditionally have been in the exclusive control of the state: one of those areas is the creation of rights of tenure for teachers. It is the legislature which determines the scope of that right.

An inquiry related to both of the previous questions is whether the subject matter is such that uniformity throughout the state is to be desired? We might more readily presume the state has preempted an area if such uniformity is warranted, say, in the name of equality and fairness of treatment of individuals. However, if diversity and experimentation is not merely tolerable, but desirable, then we should not so quickly infer that there has been preemption.

Finally a piece of evidence indicating that the legislature has not intended to preempt is an explicit statutory grant of authority in the area to local districts. Matters become more difficult if the local district derives its powers only by implication: whether the implication of such authority is warranted depends on whether one concludes the state did or did not preempt the subject.

It might be noted here that preemption has played an unimportant role in settling disputes over authority in education. Generally education is so

legitimately a matter of local concern few have argued that local districts lack authority because of state preemption. Nevertheless, as legislatures increasingly adopt new educational laws and increasingly give new powers to the state educational agencies, lawyers and courts must be alert to the possibility that preemption may become as live an issue in education as in municipal law.

E. Abuse of Discretion

Another way of challenging an action of either state or local officials is to claim they have abused their discretion. This is not an argument that they have exceeded the scope of their authority, or that the authority granted them was delegated improperly or that, in the case of the local district, they lack authority because of state preemption. Rather, the claim is that the action taken was arbitrary and capricious, irrational, or based on reasons unrelated to education. One is not attacking the law on its face but as applied by the local or state official. In that sense, the attack is narrower and not so sweeping in its implications as an attack on the statute itself. In other words, one is not saying, for example, that the district lacks all authority to prescribe a dress code in the school; one is arguing that this particular dress code represents an abuse of the school's authority.

The abuse of discretion claim can take several forms. One might argue the means chosen to achieve a legitimate educational end within the purview of the agency is so unrelated to the ends that the action is irrational. Or, one might argue that the justification provided by the agency for the action cannot be accepted because it is a non-educational justification. Or one might argue the action taken is so far beyond accepted community educational purposes and standards that it is irrational; it is just the product of unreasoned will and emotion. Or, we might say the action touches upon such important interests and

rights (important because the federal or state constitution or state legislature may have declared the interests to be important; or the interests may be important from a social, cultural and/or economic perspective) that the action can only be justified by some compelling state interest: absent such a justification the discretion must be deemed to have been abused. Or, an action may be deemed irrational if, for example, one group of people is treated one way while another group, similar in all relevant respects, is treated differently. Thus it might be concluded there is no rational justification for the distinction being drawn. Or, we might argue that discretion was abused because the agency failed to take into account a clearly stated legislative policy -- failed to be guided by that policy.

There are many ways of articulating or arguing that discretion was abused. How courts respond to these claims has an important impact upon the allocation of authority within a state.

F. Conclusion

The introduction has attempted to describe the framework used by the studies of the five states. A typology of different kinds of authority to be found in state law was described. It was there pointed out that authority in education generally takes only one form -- type two in the typology. In order to understand this kind of authority it was then necessary to analyze several related concepts: delegation, scope of authority, permissive and restrictive assumptions, preemption and abuse of discretion.

CHAPTER ONE

STATE OF ARIZONA CURRICULUM LAW

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November, 1975

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FOOTNOTES

I. Arizona Constitution

The Constitution's impact on authority to control school curriculum comes in three forms. First, there are the provisions of Article 11 which mandate the establishment of a public school system, and thereby create for the state's children, an implied right to an education. The Arizona document says little about the content of this right, and it gives to the legislature tremendous discretion for shaping the public school system. Thus, a fundamental problem in interpreting Article 11 is determining in any given case to what extent the duties owed to a child are defined by constitutional principles or by statutory law.

The second area is allocation of authority. Some powers are reserved for the electorate to be exercised by referendum and initiative. More directly relevant to education is the constitution's creation (in Article 11) of state and local institutions for governance of the public schools, plus the delegation to the legislature of the job of prescribing the rights and duties connected with these offices. Another important provision is Article 3, "Distribution of Powers." Its limitations apply to legislation purporting to delegate discretionary powers to public bodies, and to subsequent sub-delegations. Also, delegations by public bodies to private persons or groups sometimes will violate this prohibition. We are especially interested in purported delegations to parents, or to teacher organizations, of control over curriculum.

The third area is protection of individual rights. Some school official actions violate the rights of students, teachers, parents,

or others, to freedom of speech, or religion; to due process or equal protection.

A. The Right to an Education

The constitution mandates the establishment of a public school system, without describing its functions. Thus, it is the Arizona Supreme Court's task to translate that requirement into a description of the services which each school child is entitled to receive.

In recent years, the Court has decided two cases in which plaintiffs claimed educational entitlements. In Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973), the Court stated that the constitution made "basic education" a fundamental right of every child of compulsory attendance age. A few months later the Court of Appeals held that the constitutionally required minimum did not include issuance of free high school textbooks. However, the Court concluded that denial of free textbooks to indigents would violate the Equal Protection Clause, because it prevented them from having an equal opportunity with non-indigents to make use of the basic educational services which Hollins had declared to be a fundamental right in Arizona. Carpio v. Tucson, 21 Ariz. App. 241, 517 P.2d 1288 (1974).

Hollins and Carpio only begin to flesh out the abstract concept of a basic education. In the balance of this section, we will summarize the constitutional provisions on which the decisions were based, and we will analyze the courts' handling of the right-to-education issue.

Article 11 establishes the framework of the public school system. Section 1 provides, in part:

> "The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common school, high schools, normal school, industrial schools, and a university." [emphasis added]

Section 6 is complementary:

> "The University and all other State educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible."
>
> "The Legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months, in each year, which school shall be open to all pupils between the ages of six and twenty-one years." [emphasis added]

There is no mention of the content of instruction in the schools. Although few state constitutions go into any detail on that point, many do make a general reference which is a suitable starting point for judicial interpretation, e.g. promoting "diffusion of knowledge" or making the public schools into places where "children may be educated."[1] On the other hand, the requirement that a "general and uniform" system be maintained indicates that there must be statewide quality control.

In Hollins, the Court both declared the right to a "basic minimum," (its own phrase) and interpreted the "general and uniform" requirement. The case was a challenge to Arizona's school financing system. Plaintiffs lost, with the Court citing approvingly the statement in Rodriquez[2] that relative differences in spending for schooling are not by themselves of legal significance. What each school child was absolutely entitled to -- and here the Arizona

Supreme Court decided a question that the U.S. Supreme Court did not directly confront -- was a definite quantum of educational services called the basic minimum. The school financing system (despite its disparities in spending) did not contradict the basic minimum because that right did not comprehend a guarantee that each student receive an educational opportunity substantially equal to that of his competitors in the economic market place.

The Court recognized the general right in these terms:

> "[T]he state constitution does establish education as a fundamental right of pupils between the ages of six and twenty-one years. The constitution, by its provisions, assures to every child a basic education."
> [emphasis added] 515 P.2d at 592.

How does one tell if a basic education is being served up? The Court quoted a part of the Rodriguez opinion which defined the minimum as that which enabled one to effectively utilize his political rights. Each student must have the opportunity to acquire,

> "'the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.'"
> 515 P. 2d at 592, quoting Rodriguez, 93 S.Ct. at 1298-99.

Plaintiffs had argued that the requirement for having a "general and uniform public school system" prohibited substantial disparities in spending for education. The Court held that although "a basic education must be uniformly provided, unequal spending still was lawful." In its analysis, the Court touched on the applicability of the uniformity requirement to curriculum content control.

> "The present school laws do provide for a system which is statewide and uniform. The minimum length of the school year is provided in the constitution, and the legislature has provided for a means of establishing required courses,

> qualifications of teachers, textbooks to be used in common schools, and qualifications of professional nonteaching personnel." [emphasis added] 515 P. 2d at 592.

The Court did not say that centralized textbook selection, state-wide course prescriptions by the Board, or any other single "means" of enforcing uniformity was constitutionally required. However, a sudden legislative change from Arizona-style centralization to Massachusetts-style decentralization could violate this provision.[3] Still, the infirmity would be easy to cure. The legislature could rely on state-wide testing, output standards, and other mechanisms to promote uniformity in educational services without dictating textbook selections and course prescriptions. In fact, recently passed statutes requiring achievement testing lay a foundation for uniformity without detailed content control.

Only three months after Hollins, the Arizona Supreme Court had occasion to apply its "basic education" standard to a case in which indigent public high school students claimed that the Constitution entitled them to free textbooks. In Carpio, the plaintiffs argued that the Constitution required the furnishing of free textbooks to all high school students under Section 6, supra, and under Section 9, which provides in part:

> "The laws of the State shall enable cities and towns to maintain free high schools, industrial schools, and commercial schools."

Both of these claims were rejected -- the first because the term "common schools" in Section 6 did not include high schools;[4] the second because,

> "[T]he natural, obvious and ordinary meaning of §9 is that cities and towns can, if they so desire, maintain free high schools." [emphasis added] 517 P. 2d at 1293.

However, the Court decided that the plaintiff's complaint did state a claim under the equal protection clause of the 14th Amendment:

> "[W]e hold that indigent high school students who cannot afford textbooks must be provided as adequate an educational opportunity [to receive a 'basic education'] as students who can afford to buy their own textbooks." 517 P.2d at 1295.

The Court presented this holding as an application of traditional equal protection principles and modelled its analysis after Griffin v. Illinois.[5] Given the state's commitment to give every student the opportunity to obtain a basic minimum education, there was no rational reason related to a legitimate objective for making access to this opportunity significantly more difficult, if not impossible, for indigent students. Because textbooks are an integral part of the educational process for which cheaper substitutes are usually unavailable, indigent students must have a substantial opportunity to use appropriate textbooks and may not be penalized for failing to purchase any text. It is not necessary for the state to furnish free textbooks to everyone, or for that matter to furnish them to anyone on a full time basis while enrolled in a course. Arrangements could be made for short term borrowing by indigent students or a similar system so long as it did not put a significant burden on indigent students who were trying to obtain a basic education.

After Hollins and Carpio one still cannot state precisely the content of the right of each Arizona student to a basic education. We only know that the public schools must offer instruction adequate for preparing students to participate in democratic political processes.

Unless unavoidably confronted with a dispute requiring more detailed constitutional interpretation, the Arizona courts are probably content to leave it for the legislature to define the rights of students to educational services. For example, if a handicapped child were now to sue for provision of instructional services, the case would almost certainly be decided on the basis of the Special Education Act, without reaching state constitutional issues. Meanwhile, Carpio demonstrated the important legal consequences that can ultimately result from the declaration (in Hollins) of a fundamental right to a basic education. It was unnecessary to know exactly what the right consisted of, in order to find that a student without textbooks would be in a substantially worse position to take advantage of the opportunity than would a student with textbooks. Thus, establishing the right gave a foothold for an equal protection claim.

B. Allocations of Authority

In this section we examine how the constitution distributes authority to control curriculum among various institutions and actors, and how it limits the prerogative of the original holders of these powers to transfer them to others. In other words, the first problem is to describe the constitutional starting position. The second question is what kinds of delegations and subdelegations are constitutionally permissible.

Delegation is the more complicated problem, and it will consume most of our analysis. The Arizona legislature cannot run a school system. It has delegated virtually all of its decision-making prerogatives to state and local bodies. These delegatees, in turn,

have sometimes shared their authority with public and private persons in arrangements that run the gamut from the mere solicitation of advice, to the virtual abdication of any independent decision-making role. In many states, sharing of curriculum decision-making powers with parents (and/or parent organizations) or with teachers (and/or teacher groups) has been a focus of legal dispute. The issue is usually framed as a case of delegation of legislative authority to private persons. In Arizona, however, neither the legislature nor the courts have directly dealt with these problems. Consequently, we save for the end of this section a discussion of how the case law as it now stands might apply to procedures for parental control of curriculum or to collective bargaining agreements that include prescriptions about course content.

1. Square One: Original Constitutional Allocations

The Constitution reserves some powers for the electorate; it limits the powers of the legislature (which otherwise are considered to be plenary[6]); it establishes an institutional framework for management of the public school system; and it impliedly grants some minimal powers to the institutions it creates.

The main reservations of popular control are the provisions for initiative and referendum,[7] and for recall.[8] "Every public officer . . . holding an elective office" is subject to being recalled. This includes, of course, school board members. It appears, however, that recall elections for school officials are infrequent, and we know of no case in which a board member had to stand for special election because of opposition to his position on a curriculum issue.[9]

The education article of the constitution can hardly be said to impose many limits on legislative discretion over the school curriculum.

Although the document obliges the legislature to establish a school system which is general and uniform and which has a free common school in every district, nothing is said about methods for discharging the obligation. As we noted in section (A), the Arizona Supreme Court has declared that the services provided must be sufficient to enable any student to get a "basic education."

Sections 2 and 4 of Article 11, outline an institutional framework for conducting public education.

> "Section 2. The general conduct and supervision of the public school system shall be vested in a State Board of Education, a State Superintendent of Public Instruction, county school superintendents, and such governing boards for the State institutions as may be provided by laws." [emphasis added]
>
> "Section 4. The State Superintendent of Public Instruction shall be a member, and secretary of the State Board of Education, and, ex-officio, a member of any other board having control of public instruction in any State institution. His powers and duties shall be prescribed by law." [emphasis added]

The underlined phrases, "provided [prescribed] by law" affirm the dominant role of the legislature in deciding what kind of school system the state will have.

Despite its skeletal nature, this institutional structure impliedly puts some general constraints on the legislature. No statute can contradict the role of Superintendent and Board as carrying on "general conduct and supervision" of the system; the brief description of the office of Superintendent shows that it is intended to be an executive office; the reference to common school districts implies that there must be some local organization and supervision of schooling.

Admittedly, this exegesis is vague. The important and practical problems of authority distribution center around actions by the

legislature or by persons claiming power derived from statute. If state constitutional issues are raised, they are most likely to involve a claim that the purported derivation of authority violates the Distribution of Powers article of the constitution, or that the action constitutes an infringement of constitutionally protected individual right.

2. Squares Two, Three, Four etc.: Delegations and Subdelegations

First we survey the kinds of disputes that raise delegation problems. Then we analyze the decisional law on the subject. It is impossible to construct a complete and coherent doctrinal system. The Arizona holdings do, however, fit into a pattern. After noting the doctrinal language used by the courts, we isolate the major factors which appear to explain the decisions (more logically than the supposedly doctrinal judicial phrases). We apply our form of analysis to several leading Arizona delegation cases, and then to hypothetical situations in which parents or teachers have been delegated authority over curriculum.

In classifying the delegation cases, it helps to distinguish between delegations and subdelegations, and between delegations to public actors and delegations to private persons. The legislature's enactment of a statute empowering the Board to prescribe 3-5 basic textbooks for each mandated subject is a delegation to the Board of part of the legislature's powers over curriculum. The Board each year appoints a Textbook Evaluation Committee (established by its own regulation, not by statute) to make recommendations about the textbook adoptions. If the Board had bound itself in advance to accept the committee's recommendations, that would have constituted a subdelegation.[10]

The Arizona courts say that they follow the rule; a delegated power may not be delegated. Consequently, "sub-delegation" is a conclusory term, stating that the arrangement so labeled is unlawful. In many situations, however, "sub-delegation" seems to be the most appropriate term to describe a power sharing, even though it is found to be legal. We sometimes use the term in that non-conclusory sense.

In the above examples, the Board and the Textbook Evaluation Committee are public bodies.[11] By comparison, a teachers' association, or a self-constituted group of parents petitioning a school district to offer a particular course, are private actors. Some entities have both public and private aspects -- the board of a special purpose water district, a quasi-official parent/teacher/student governing board -- and classifying one as "private" is just a way of stating the conclusion that it may not be delegated the power it purports to exercise. Many cases, however, involve clearly private decision-makers, and the question is whether they have actually been delegated substantial authority, and if so whether that offends the state constitution.

Arizona legislators and school officials have shown relatively little interest in sharing their authority to control curriculum with private persons, with the result that we have no cases and no real examples. Apparently, the furthest the Board has gone in this direction is in a textbook regulation and in sex education guidelines. The former requires that interested persons be allowed to inspect (but that is all) curriculum materials that are proposed for adoption.[12] The common school sex regulations provide that a child can attend sex instruction only with explicit parental consent; both the common school

and high school regulations urge local districts to consult with parents in the process of deciding on the content of the lessons.[13] These examples are miles away from a delegation of substantial decision-making authority. By comparison, a Massachusetts statute requires that a high school offer any course which is requested in a petition signed by twenty parents of students in the school.

There are two main sources of law for claims of unlawful delegation. The federal due process clause (or a parallel state one) can be invoked -- a person whose life, liberty, or property is being affected by the decision of a body imbued with governmental powers argues that it is unfair for <u>that</u> body to exercise <u>those</u> powers.[14] Second, many state constitutions, including Arizona's,have a separation of powers article which limits the shifting around of powers. Most important is the idea that the legislature <u>absolutely</u> may not delegate any of its intrinsically legislative powers. (These are sometimes referred to as "core police powers."[15]

A third element which should be kept in mind, although it is not a doctrinal matter, is that there is a general spirit which animates the delegation decisions, although rarely is it explicitly expressed. Courts appear to be influenced by the potential in any given arrangement for government powers to be utilized by biased, self-interested, or exploitative groups of persons. This is especially relevant to cases involving private entities -- handing over the power to license photographers to their competitors (already established and licensed photographers) is suspect; adopting the standards of a chiropractory association for state licensing of chiropractors is less suspect, because of professional constraints on imposing purely economically

related guidelines; letting teachers participate in establishing evaluation procedures for certification (as provided for in a recent Arizona statute) probably lies somewhere in-between.

We have found that court decisions of delegation issues appear to depend on how three variables are evaluated. Turning now to the more specific delegation doctrines, they can best be organized under these three headings.

(1) What kind of transactions does exercise of the decision-making power effect?

(a) If general taxation; or immediate conditions of public health, safety, and welfare; then core legislative powers are involved. These never can be delegated by the legislature. Powers which may or may not fit into this category are zoning; determining wages of public employees.

(b) Some powers which the legislature may delegate to public agencies, may not thereafter be sub-delegated to non-official entities. A simple-minded rule to this effect is "delegated powers may not be delegated." A more refined approach (though still plagued by many ambiguities) distinguishes between policy-making and proprietary decision-making. The former powers are non-delegable. General control of teaching materials and methods is surely a matter of policy which cannot be handed over to teacher associations. On the other

hand, there is no constitutional bar to a district binding itself on the question of teacher salaries. (However, in Arizona there are statutory problems with enforcing the contract, if the district breaks it. See Infra, at 214.) A borderline case is deciding on a pupil/teacher ratio. It can be considered a proprietary question (teacher working conditions) or it can be classed as a policy decision regarding distribution of available revenues among salaries, plant, and materials.

(2) How much discretion has been delegated?

(a) The advisory role theory. So little discretionary authority has been given up by the original decision-maker that there has been no real delegation. For example, because the Board still has the final say on guidelines for textbook adoptions after the Course of Study Committee has made its recommendations, it can be said that no Board powers have been delegated. So long as the theory is not belied by practice, it should hold up; thus, the Board's decision in February 1975 to substantially modify the recommendations of its Language Arts Course of Study Committee demonstrates the reality of the "advisory" label. When a statute or agency policy "adopts" the standards of some private organization, the advisory role theory is a misleading fiction if there is no practical alternative to accepting those standards. We argue below that the Court of Appeals wrongly applied the "advisory" theory

in Quimby, infra, at 17.

(b) The adequate (substantive) standards theory. The delegatee shares in the final decision, but its participation is allowed so long as it is kept within the relatively narrow bounds enunciated by the delagator. The classic situation is legislative delegation to an administrative agency of some of its powers to regulate an area of commerce. The test is whether there are statutory standards which are clearly and narrowly enough drawn that the agency is said to be "filling in the details" of the legislative scheme.

According to the Arizona courts, this test is the appropriate one.[16] It is an overly flexible doctrine, one which often lets courts easily justify any of several conclusions. Statutes frequently lack clear and comprehensive standards -- sometimes courts will strike down the arrangement for absence of adequate standards; other times the court will "imply" from the overall statutory scheme enough details to uphold the delegation.

(c) The administrative standards (or procedural safeguards) approach. Very broad statutory grants of power to administrators will be upheld when the administrators have limited their own discretion through the promulgation of agency policies, rules, and regulations by means of fair and comprehensive administrative procedures. The leading advocate of the view has been Professor Davis. It has been gaining adherents among the states. The

Arizona Court of Appeals explicitly rejected this substitute for the adequate standards rule, however, in State Compensation Fund v. De La Fuente.[17]

(3) What is the nature of the party to which decision-making power is delegated?

(a) The public/private distinction. The major characteristic separating the public decision-maker from the private one is that the former is "accountable" through political processes to the persons affected by its decisions, whereas the latter is not. Determining whether or not there is accountability can lead to circular reasoning, because of the intervention of Fourteen Amendment doctrine. The more governmental powers that are exercised, than the stronger the contention that this is an instance of "state action," which invokes a whole panoply of constitutional restrictions which make the body relatively accountable after all. The delegation itself may be a factor turning the "private" body's acts into state action, and then the state action finding may be a reason for considering the body public, and therefore a suitable recipient of the delegatee authority. The difficult question is, what characteristics allow an entity to remain in the private domain, yet to exercise delegated powers.

(b) The general/special purpose distinction. This differentiates between kinds of public entities. Plenary powers may not be exercised by a special interest group, but

specially interested persons may be delegated authority to deal with their special interests. When voting in school board elections was at stake, the U.S. Supreme Court treated school districts as if they were bodies exercising plenary governmental powers.[18] It may still be possible, however, to lawfully give parents a weighted vote in curriculum decisions that peculiarly effect their interests through their children.

The results in a delegation case can best be understood in terms of findings of the court in respect to these three basic variables. The decision of the Court of Appeals in Quimby v. School District No. 21 of Pinal County, 10 Ariz. App. 69, 455 P.2d 1019 (1969), illustrates the effectiveness of this analysis, and shows the sorry state of Arizona decisional law in the delegation area. The reasoning of the opinion can be abstracted as follows:

(1) Making rules governing participation on school sports teams was educational policy-making; therefore the local board could not delegate that function.

(2) The role of the so-called delegatee was merely "advisory," therefore there was no delegation.

(3) The so-called delegatee clearly was a "private" entity, but that is inconsequential because, as stated above, it was delegated no policy-making powers.

We will show that point (2) is clearly wrong. The only way for the court plausibly to reach the result that it did -- upholding the exercise of discretion by the private delegatee — was to change its conclusion in point (1), and find that the power exercised was not a policy matter,

and could be delegated to a private group. Otherwise, the only way to continue the challenged decision-making arrangement was through legislative action reconstituting the delegatee as a public entity.

Mike Quimby enrolled in Coolidge High School and went out for football. He practiced with the team for two weeks, until the coach informed him that he was ineligible to participate in interscholastic athletics under the by-laws of the Arizona Interscholastic Association (AIA). The AIA was a non-profit, voluntary association to which Coolidge High School belonged.[19]

Quimby sued the school district to enjoin it from enforcing the AIA elegibility regulations against him. He claimed that the school's membership in AIA constituted an illegal delegation of the authority of the governing body of the school, and that enforcement of the regulation violated his rights under the Equal Protection Clause. The Court of Appeals rejected both contentions.

The decision-making power at stake was that of the school board to make rules governing participation of its students in school programs. The court noted the Arizona Supreme Court's holding in Alexander v. Phillips[19A] that both interscholastic and intramural competitive athletics were part of the curriculum. The power to set educational policy was undeniably involved. Therefore the court directed its attention away from the kind of decision-making to the scope of authority exercised by the AIA.

> "[I]f the district here has turned over control as to any appreciable portion of its athletic program to the Association, there might very well be a violation of the rule that delegata potestas non potest delegari [delegated power may not be delegated]."
> [first emphasis added]. 455 P.2d at 1021.

In determining the scope of the AIA's powers, the court did not discuss the presence or absence of standards to guide its rule-making, but relied solely on the theory that the school board had adopted the AIA's rules as its own, i.e. that the AIA's role was strictly advisory. This argument is hard to accept. Its premise is that membership in the AIA is voluntary, because the board can withdraw at any time. But to go from that premise, to the conclusion that the AIA's powers, in practice, were only advisory, assumes that retention of membership status by the school board was inconsequential.

In fact, almost every public and private high school in Arizona belonged to the AIA. Before a member school could compete with a non-member, it had to obtain the permission of AIA's executive Board. Almost all of these waivers were sought for the purpose of playing out-of-state teams, or the teams of small Arizona private schools.[20] The willingness of the AIA Board to approve competition by its members with a school that has recently withdrawn from membership in order to avoid the effect of AIA by-laws would have been questionable. In short, if the defendant board had left the AIA because it did not want to apply the eligibility rule to Quinby, in all likelihood that action would have destroyed the high school's program of interscholastic competition.

In other words, the AIA rules were not merely "advisory" because membership in AIA was not strictly voluntary -- a school could withdraw, but it could still be sanctioned afterwards by being excluded from interscholastic competition in the state. The heart of the membership arrangements was a bargain. Each school district gave up some of its control over its own interscholastic athletic program because it recognized that statewide uniformity was necessary for interdistrict

competition to be carried on. The overall agreement was reasonable enough -- the court's main concern should have been whether it:

a) exposed students to the potentially arbitrary exercise of government power (by a private body); or,

b) delegated important policy-making responsibility to a non-accountable entity.

Actually, the court addressed itself to point (a) in its discussion of the equal protection claim. Its reasoning there illustrates the paradoxical interaction of state action doctrine and delegation doctrine. The delegation discussion assumed all the way that the AIA was a private entity. Then, in the equal protection section, the court turned around and found that the AIA was directly enough involved with governmental functions that its actions were subject to review under the Fourteenth Amendment.

> "Rules adopted by this Association have the direct effect of granting or denying participation in a part of the program of a tax-supported institution." [emphasis added] 455 P.2d at .

Although we disagree with the court's conclusion that the AIA actions did not violate Fourteenth Amendment standards,[21] its finding of enough state action to make the constitutional tests applicable partly remedies our objection that the AIA powers were more than advisory, and should not be exercised by a private entity. That entity's actions had to meet constitutional standards of rationality and fairness.

Finally, the Quimby holding can be shored up by showing that non-accountability (point (b)) was not a fatal problem. The strongest argument would be that the AIA was performing a function that no single school district could perform by itself. It made rules that were immediately effective throughout the state, creating the uniformity

necessary for interscholastic competition. Here a distinction can be made between athletics and other aspects of the curriculum. Every board is capable of prescribing the content of its social studies courses without delegating authority to, say, a statewide private association of social studies teachers. Such a delegation would be unlawful. However, there should be no objection to a school district binding itself to certain rules of that same association for the purpose of participating in a state-wide social studies "College Bowl" competition. Conversely, if a district bound itself to AIA rules (if such rules existed) pertaining to physical education instruction and having no relation to interscholastic competition, that would be considered an unlawful delegation. A further element of accountability is that the AIA Board is composed of school officials — principals, superintendents, district board members.

The way we would summarize our alternative rationale for the Quimby holding, using our analytical framework is as follows:

(1) The rule-making authority affected "curriculum", and therefore involved policy; however, interscholastic competition is a fringe area of curriculum, and the rule-making authority was tailored to performing a special function that could not be performed by the local board by itself, therefore the authority was not inherently non-delegable (but certain safeguards would have to be satisfied).

(2) The role of the so-called delegatee was not merely advisory, because it could sanction members after they withdrew from membership. Therefore, there was a delegation.

(3) The delegatee was private in some respects and public in others. Its involvement with a government function was great enough to warrant a finding of "state action," with the consequence that persons were safeguarded by the Fourteenth Amendment against unfair decision-making by the AIA. Also, there was a trace of political accountability because the AIA Board consisted of public officials.

Stated in this form, the delegation issue in Quimby is not easily concluded, but at least the real considerations are brought out. On balance, we think the delegation should have been upheld (which it was).[22] However, the opposite result would be defensible. Such an opinion would probably include a statement that the AIA could resume its functions as soon as appropriate legislation constituted it as a more public body.

The Quimby analysis shows that the three parts of our analytical framework are interrelated. However, there are cases whose holding apply more to one or another point. Thus, we will organize our summaries of the cases under the three headings.

(1) Object of decision-making

(a) The power and duty of school officials to "manage and control" educational institutions may not be "diluted or delegated" by school boards. Board of Education of Scottsdale High School District v. Scottsdale Education Association, 17 Ariz. App. 504, 498 P. 2d 578, 584 (1972); See also, Communication Workers of America v. Arizona Board of Regents, 17 Ariz. App. 398, 498 P. 2d 472 (1972). In Scottsdale, it was held that a district could not enter a collective bargaining

agreement containing any terms of employment that could not be "included in a standard contract for individual teachers." 498 P. 2d at 586. The holding, however, was based on statutory, not state constitutional grounds. The constitutional delegation question need not be decided unless and until Arizona enacts a professional negotiations law.

(b) Taxation. It is unconstitutional for the legislature to delegate both the power to fix a rate of taxation according to a standard, and the power to prescribe the standard. Duhane v. State Tax Commission, 65 Ariz. 268, 179 P. 2d 252 (1947). That doctrine was strictly applied in Climate Control, Inc. v. Hill, 86 Ariz. 180, 342 P. 2d 854 (1959). Where a power other than taxation is involved, Arizona courts are more flexible in implying standards from the statutory scheme, when none are specifically described.

(c) Licensing professions. Statute giving private photography association power to license photographers struck down in Buehman v. Bechtel, 114 P. 2d 227 (1941). Opinion used substantive due process language in support of holding, but its reasoning would also be basis for a finding of an unconstitutional delegation. Emphasis on the special interests of the delegatee, and the absence of any good reason to give the association discretionary authority.

Requirement that applicant for chiropractic license have graduated from school whose standards were recognized by National Chiropody Association (NCA) upheld, and Buehman distinguished, in State v. Hynds, 61 Ariz. 281, 148 P. 2d 1000 (1944). We agree that cases are distinguishable, for reasons stated in next section, under "advisory role," and "adequate standards."

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(2) Scope of discretion.

(a) Advisory role.

(i) In Hynds, supra, the private organization did not actually make licensing decisions, as did the photographers' organization in Buehman. In addition, the statutory language does not preclude licensing of a person who graduated from a school not actually endorsed by the association, but whose training was found to meet the NCS standards anyway. Thus, although there would be a relationship between the standards set, and the number of persons eligible to enter into practice, the relationship would be indirect enough that the association members could not easily exploit their selfish private interests. The association can therefore be said to stand in an advisory position in relationship to the state agency's licensing decisions.

(ii) School board adopting rules of Arizona Interscholastic Association, puts latter in advisory position. Quimby, supra. We argued above that this finding in Quimby ignores vital facts.

(iii) Fair Trade Act (non-signer provision) upheld, Skaggs Drug Center Inc. v. U.S. Time Corp., 101 Ariz. 392, 420 P. 2d 177 (1966). The Court rejected the argument that the legislature had delegated a power to fix the price of goods; it pointed out some options the retailer had which permitted him to avoid the price restriction. The concept here is not really one of "advice", but rather that the complainant can choose not to come under the power of the delegatee.

(b) Adequate standards.

(i) The greater the need of the legislature to rely on expertise

of the delegatee, the more discretion can be given the latter. Thus, in Buehman, there was little need to rely on the judgment of the photographers, but in Hynds the medical expertise of the chiropractors was essential. Also, there was some assurance that the chiropractors' commitment to professionalism would reduce the chances that the association's standards would be manipulated to serve selfish economic interests.

Professor Davis has suggested a test along these lines. One asks whether the actions taken by the delegatee are taken in response to the delegation. If not, the delegator should usually be allowed to incorporate those actions into its standards. Thus, in Hynds, the argument should be that the association would set its standards according to its best professional judgement regardless of the licensing law.

(ii) The adequate standards test has been so stretched that it is rarely used to strike down a delegation, and when it is, one is led to wonder — why in this case and not in others? A recent and rare example of its use is State Compensation Fund v. De La Fuente, 18 Ariz. 246, 501 P. 2d 422 (1972). There, a statute had omitted mention of the amount of compensation for a particular kind of beneficiary. The court struck down the Commissioner's attempt to fill in the gap, and would not supply a standard itself. It is more common, however, that when it is pointed out to the court that the statutory language leaves an administrator considerable discretion, that the court implies some limitations from the statutory scheme.[23]

(c) Administrative Standards (Procedural Safeguards)

The Court of Appeals explicitly rejected this approach, advocated

by Professor Davis, in De La Fuente, supra.

(3) Nature of the Delegatee

(i) A private entity may still be so involved with governmental decision-making as to make its decisions state action under the Fourteenth Amendment. Quimby, supra.

(ii) Some kinds of public organizations are sufficiently specialized and proprietary that for them to share decision-making power with employees is not an unlawful delegation of sovereign power. Local 226 v. Salt River Project, 78 Ariz. 30, 275 P. 2d 393 (1955). An agricultural improvement district could enter into collective bargaining agreements with their employees -- the latter were considered to be in the private sector as compared to teachers, police, and firemen, who are in the public sector.

> "The nature of the District's operations and purposes are not designed to 'serve the whole people' as we commonly conceive the role of government."
> 275 P.2d at 401.

The opinion is better than many in the delegation area because it gets down to analyzing the interests at stake in the particular situation, and deciding what safeguards are or are not constitutionally required.

* * *

Can authority to control curriculum be delegated to students? to parents? to teachers? The short answers to this question are "yes" and "maybe." Yes, the legislature could enact laws making these actors participants in the curriculum-making process. Maybe, under current law, the Board and local boards could delegate some powers to these groups; in the case of delegation by these agencies, however, one would have to say that there was actually no delegation, but only a "consultation" with the delegatee.

To look at the problem in more detail, we discuss several examples, which follow.

a) A statute (like one enacted in Massachusetts) providing that a high school must offer any course requested by 20 parents.[24] The object of the decision-making,[25] -- course prescription -- is one that the legislature has, in the past, included in delegations to state and local agencies without any constitutional infirmities being found. However, the nature of the delegatee[26] is very different -- private persons would exercise the power. Whether an Arizona court would find that the statute violated the Distribution of Powers article would depend on specifics in the arrangement, for example:

(i) If the statute designated circumstances which would permit the board to refuse to offer the course, it could be said that the parents had merely an advisory power, even though the board usually adopted their recommendations. Cf. Quimby, supra. An "advisory" situation might also be created through judicial interpretation, if the court declared that the board had the final say on such characteristics of the requested course as -- how many hours of instruction, what materials, what topics covered, what instructors taught it; or if the board could decline to offer the course on the ground that existing courses sufficiently covered that subject matter.

(ii) The statute could contain explicit standards narrowing the exercise of the course selection powers. The board might only be bound to create the new course if it wouldn't drain substantial resources away from the regular course of instruction; if the course was not inconsistent with the board's general policies about course content

and instructional methods; if there was no great likelihood that the course would have a segregated enrollment (by self-selection) on the basis of race, ethnicity, or economic status (and there could be exceptions for instruction in the history or culture of minority groups); and so on. Such strict statutory standards would neutralize the dangers of exploitation and unaccountability that otherwise would be feared from a delegation to a private group.

b) Without any statutory changes, the Board enacts a regulation permitting any local board to adopt a procedure like that in (a), That is, the board binds itself to offer any course requested by 20 parents. If the Arizona courts were serious about the rule, "delegated powers may not be delegated," then this arrangement would be struck down, UNLESS the procedure was shaped to fit into the advisory role theory (in which case it would be said that there really was no delegation at all).

c) A statute provides that the Board may delegate some of its duty to prescribe subjects of instruction to local boards and parents. Although there are no precedents on this point, this enabling provision should at least eliminate the subdelegation problem in example (b). That is, so long as the legislature could have originally delegated course selection powers to parents (our first example) then it should be able to allow the same result through a series of authorized sub-delegations.

d) A statute creating a parent organization in each common school; prescribing democratic procedures for election of representatives and internal governance; and requiring each board to offer any course requested by the organization. This variation of the hypothetical

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statute allowing ad hoc parent petitions, is designed to transform the delegatee, parents, from a private into a public or quasi-public entity. The decisions of the organization would be state action subject to Fourteenth Amendment scrutiny; and the governance procedures would assure accountability to the parent constituency. However, the accountability problem would not be solved if the powers exercised by the organization had a substantial impact on the interests not only of parents, but also of other electors. The authority must be specialialized enough to avoid the applicability of Kramer v. Union School District 395 U.S. 621 (1969) and to come within the rules of Salyer v. Tulare, 410 U.S. [illegible] and Local 266 v. Salt River Project, 78 Ariz. 30, 275 P. 2d 393 (1955).

e) Delegations and subdelegations of curriculum powers to students would undergo much the same analysis as in the first four examples, but would be harder to uphold. Students are especially suspect as private decision-makers because of their self-interest in curriculum matters; moreover, it is difficult to constitute them as a "public" body since they are not (usually) qualified electors. Thus, student decision-making will have to be in advisory form for matters of general importance. However, it would not violate the separation of powers article to place a voting student representative on a board or agency exercising substantial curriculum-making powers.

Federal and state guarantees of individual rights will sometimes operate in a way that gives students a final say over some aspects of curriculum -- usually its informal components. The First Amendment can prevent a school official from censoring the content of a student newspaper, or from forbidding expressions of political opinions through non-disruptive forms of communication.

f) A 1974 statute providing for teacher assessment requires that "the governing board shall avail itself of the advice of its certified teachers." A.R.S. sec. 15-268 (A). If a governing board went further, and in a collective bargaining contract agreed to give a teachers association a veto power over any assessment system it proposed for adoption, the Arizona courts would probably consider that to be an unlawful delegation of policy-making powers.[27] The self-interest of the private group is especially suspect, and is not overridden by an expectation that its decisions would be primarily guided by objective professionalism. In other words, the example is closer to Buehman, supra, (striking down licensing procedure for photographers) than to Hynds, supra, (upholding chiropractor licensing.)

g) A collective bargaining agreement with a teachers association includes a limitation on class size.[28] The crucial issue is in part (A) of our general analytical framework. Is the object of decision-making a policy matter, or merely a proprietary question of working conditions of employees? Our guess is that the presently constituted Arizona Supreme Court, if forced to decide this question, would find that a substantial policy decision had been delegated to a private group and the arrangement violated the distribution of powers article.

* * *

The working out of these examples was intended to give some sense of how the Arizona courts would be likely to treat arrangements which gave students, parents, and teachers an increased role in shaping curriculum. We think that our three-part framework for analyzing delegation problems more effectively isolates the central problems and

clarifies the interaction of different doctrines, than do any of the approaches taken in opinions of the Arizona courts. However, the framework is, at this time, a methodological tool suggested by commentators, not a legally required set of tests. So long as rules such as "delegated powers may not be delegated," and "adequate standards," continue to be summarily announced and ambiguously applied, one has to be prepared for surprising results or unreasoned opinions.

C. Individual Rights

There are three main ways in which constitutional protection of individual rights can affect curriculum control. First, these rights limit the power of school officials to exclude children from school. Obviously, the student who is expelled for wearing long hair has no curriculum. In this respect, protection of civil liberties has the effect of affirming the right to an education. Second, to the extent that the speech of students or teachers is protected, there is an "open curriculum" within the school. Officials cannot predetermine what will be said about every topic. Third, when a court upholds the enforcement of a coercive rule against a civil rights challenge, it is saying that the form of control has an important educational purpose. Implicit in the Arizona Supreme Court's decision to uphold the suspension of a student for wearing long hair is a judgment that teaching children to abide by conventional standards of personal appearance is so important a part of the curriculum that it may be carried out not only by instruction, but also by coercion.

In addition to these main themes, there sometimes arise other relationships between individual rights and curriculum control. The

Arizona Constitution has a "Right to Privacy" section, which states:[29]

> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

This provision probably requires teachers to exercise unusual caution before asking children to talk about family background, activities and attitudes.[30] Another possibility is that the interpretation of the First Amendment to include a "right to hear" places an affirmative duty on the school to include diverse political viewpoints in its curriculum. This idea is treated more fully in the chapter on constitutional law. (See also, infra at 93)

Our concern at this point is how the Arizona Constitution's guarantees of individual rights fit into any of these curriculum-related categories. The decisions of the Arizona Supreme Court indicate that if one wants to affect curriculum through assertion of individual rights, one had best go to federal court and rely on federal constitutional claims. This picture is slightly confused, however, by some liberal decisions of the Arizona Court of Appeals which were not appealed to the Arizona Supreme Court.

The Arizona Supreme Court most recently revealed its theories of individual rights in the school setting in the "long hair" case, Pendley v. Mingus Union High School District, 109 Ariz. 18, 504 P. 2d 919 (1972). The Supreme Court, reversing the Court of Appeals, upheld a school board regulation (and expulsion of a student under it) requiring male students to have their hair off the forehead, collar and ears. The plaintiff had based his claim on Fourteenth Amendment due process, Fourteenth Amendment equal protection, First Amendment Speech,

Ninth Amendment reserved rights, and the penumbra of the Bill of Rights. His equal protection argument challenged two classifications -- treating male and female students differently as to permissible hair length; treating long-haired students and short-haired students differently by excluding the former from public education.

The majority opinion explained that individual rights had to be balanced against the discretionary authority vested in elected school officials to manage public education.

> "[W]e believe that this duty [protecting individual rights] can be discharged while at the same time paying deference to the authority of the school board in the day-to-day operation of our schools." [emphasis added] 504 P.2d at 926.

In embracing the deference doctrine, the opinion specifically rejected the more scrutinizing approach that has been advocated by Professor Goldstein.[31] His view has been adopted, at least in part, by four Circuit Courts of Appeal.[32] Thus, although

> "a student does not lose the protection of the Constitution when he enters the schoolyard" 504 P.2d at 925,

he must, as plaintiff, prove a "clear violation"[33] of his rights by official action, and prove that the rule or action has no rational basis, and has no direct relation to a vital state interest.[34] The Court held that hair styles were not clearly protected by any provision of the Bill of Rights, and it agreed with the jury and trial court that the record demonstrated a connection between the rule, and the maintenance of order in the schools.

Holohan, J., dissenting, disputed both points.

On the Constitution:

> "The student is denied the privilege granted to similar students based upon a standard to be measured by the length of his hair.... To me this is a denial of that liberty reserved to the people by the Ninth Amendment and protected from state interference by the Fourteenth Amendment." 504 P.2d at 927.

As to the record, the portions quoted and relied upon by the majority showed no disruption of school operations.[35] Apparently, the only injury was to the feelings of the administrators. The school psychologist testified that it was reasonable to assume that it is beneficial for students to be made to imitate standards of behavior or appearance "democratically arrived at by the majority." He later refined the majoritarian concept to stress the desirability of imitating a particular segment of the population, the "best of the professionals."[36] Holohan concluded that the disruption argument had no merit, and the case boiled down to the question

> "whether a school district may order conformity by all students to the standard of good grooming prescribed by the school board?" 504 P.2d 928.

His answer, of course, was "no."

Holohan's refutation of the "disruption" argument is stronger than the majority's opposite conclusion. Thus, on the facts of the case, the majority opinion demonstrates the Court's willingness to let schools go to considerable lenghts in coercing uniform appearance of their students. This affects curriculum, because dress codes and grooming codes set a tone of conformity which is a "lesson" in values. In Pendley, the Court also passed up an opportunity to use a claim of individual right as a way to enforce the student's right to an education. Pendley's choice was to cut his hair or go to a private school (one

which permitted long hair). While the Court held, in Carpio, supra, that a high school had to furnish free textbooks to indigents because otherwise they would not have an equal opportunity to obtain an education, it held in Pendley that a school could totally deny an education to long-haired students while it continued to furnish it to shorter haired students. The Court appears to have no clear or consistent theory of the relationship between equal protection and the right to an education.[37]

Although, in Pendley, the Supreme Court rejected the claim that long hair was protected by symbolic speech, there are a few Court of Appeals decisions and a federal district court opinion which lay a strong basis for freedom of speech claims. A word of caution is in order, however, before we summarize those holdings. If the Arizona Supreme Court chose to take the position that the Arizona Constitution's freedom of speech clause did not add to the protections of the federal constitution, it would have textual support. First, the free speech clause has an addendum saying that every speaker is "responsible for the abuse of that right."[38] Second, the freedom of conscience clause states:

> "[T]he liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the State, or with the rights of others."[39]

In 1970, the Arizona Federal District Court held that burning a United States flag was protected symbolic speech. Crosson v. Silver, 319 F.Supp. 1084 (D. Ariz. 1970). The focus then changed from patriotism to sex, when the Arizona Court of Appeals held that topless and bottomless dancing was a protected form of expression (so long as

it was not obscene as a matter of law). Yauch v. State, 19 Ariz.App. 175, 505 P.2d 1066 (1973). The Court stated that nudity, per se, neither was protected by the Constitution nor could be deemed obscene. Constitutional rights became involved, however, when nudity was made part of a dance. Nonspeech expression, even when it is merely entertaining, is protected.

Freedom of speech may be limited when it inflicts harm on others. Injury to children can be singled out for special attention. In Cactus Corp. v. State ex. rel. Murphy, 18 Ariz. App. 38, 480 P.2d 375 (1971), the state was trying to enjoin the showing of a particular film at a drive-in theatre, claiming that projections of it there were a public nuisance. The screen was easily seen from the surrounding residential neighborhood and from a nearby highway. In fact, it was hard to avoid seeing it. The film depicted nudity and various heterosexual and homosexual acts. While the court found that the movie was obscene, and therefore a nuisance per se, it stated that under the rule of Ginzberg v. U.S., 383 U.S. 483 (1966), such a finding was not necessary for the holding, since non-obscene materials may be regulated so as to protect children. In the instant case, a child psychologist testified that children would be harmed by viewing the film.

* * *

In conclusion, the Arizona Supreme Court has added little or nothing to federal guarantees of individual rights, insofar as they might be used to redistribute some control over the curriculum from officials to students, parents, teachers, or others. With the exception of its Carpio decision, (denial of free textbooks to indigents violates equal protection clause) the Court has not used the individual rights provisions of the Arizona Constitution to protect and expand the

right to an education, nor to establish an "open curriculum" by protection of speech; nor to prevent coerced uniformity of appearance or behavior of students. However, there are decisions of the Court of Appeals and the U.S. District Court, District of Arizona, which are favorable to speech and therefore to the "open curriculum."

II. Legislature

Article 11 of the Arizona Constitution gives the legislature plenary authority to manage public education. Although the State Board (hereafter, Board) and the Superintendent of Public Instruction (hereafter, Superintendent) are named in the document, their duties are left completely open for legislative definition. To find limitations on legislative authority, one must look beyond Article 11 to other state constitutional provisions (e.g. the Declaration of Rights and the Separation of Powers article) and to federal law.

As regards curriculum, the legislature has exercised its powers in a variety of forms. One form is authority allocation. For example, there is the legislature's delegation to the Board of power to prescribe the subjects to be taught in all common schools.[1] This provision states no substantive criteria for Board action. At the other extreme we can find legislation that is almost entirely substantive. The free enterprise law, for example, makes it mandatory for high schools to give a required course in the free enterprise system. The statute provides a fifty word definition of "free enterprise."[2]

Most curriculum-related statutes combine authority allocation and substantive standards. The Special Education Act[3] authorizes local school districts to provide services for children with special needs. However, the locality may only place in its programs such children as fit into one of the legislatively defined categories of gifted and handicapped children. The Act includes a general definition of what constitutes "special" instruction,[4] establishes some rules binding on all programs; (e.g. that

they be conducted in a facility housing regular education classes)[5] and provides for rule-making and for oversight of local programs by a state division of special education.[6]

This intermixing of authority allocations and substantive standards appears frequently in the education code. The Special Education Act includes an added feature -- one which appears less often in Arizona than in other jurisdictions. It subjects the grant of decision-making authority to explicit procedural safeguards. (Each evaluation of a child must include consultations with administrators, medical personnel, and parents, and each placement must be approved by the parent or guardian; meanwhile, the program as a whole is subject to review by a state official.)[7]

We have grouped the legislature's actions under four headings:

1) Authority allocations
   state v. local
   officials v. private parties (parents, teachers)
   [professional/administrative v. political]
2) Student classification
3) General curriculum standards
4) Expressly mandated courses

These categories move along a spectrum from role allocation to direct, substantive control. As in the case of the Special Education Act, however, almost every statute contains traces of each characteristic.

Before moving into an analysis of particular statutes, a few background comments about the education code as a whole are in order. First, Arizona's code is short. A 1971 paperback edition filled only 182 pages. A document of this size could adequately guide the participants in a decentralized education system -- one which left

important decisions in the hands of local boards, parents, teachers, and students. But for a system of law which entrusts centralized agencies with considerable power, it is a very brief operating document, and is, in fact fraught with ambiguities and omissions. Moreover, Arizona has no official legislative history to help with filling in the gaps. Second, because of a scarcity of court decisions of record, and of an apparent reluctance of disputants to litigate school conflicts,[8] the county attorneys and the state attorney general play an unusually active law-interpreting role, both formal and informal.[9]

Finally, one would expect the absence of detailed statutory law to increase reliance on secondary aids to construction, such as using legal presumptions, or referring to traditional educational practices as indicia of legislative intent. When curriculum commissions formed by the State Board began to develop detailed course syllabi for the common school mandated curriculum, outraged advocates of local control could not deny that the commission actions were consistent with the literal terms of the statutory delegation to the Board of power to prescribe courses. They asserted, however, that those actions contradicted the essential role of local school districts, a role evidenced by the failure of any previous state board to invade the province of the localities in managing the details of course content during the several decades that the statute was on the books. It could also have been argued that the code's restrictive presumption (see infra, at 173) negated the Board's new claims of authority to control curriculum. Neither argument is in the crisp, deductive form that courts are best equipped to handle. The brevity of the code, however, gives this kind of argumentation an important role in Arizona discourse.

1. Allocations of Authority.

a) State v. local

With exceptions noted under the other headings in this section, the legislature has delegated to the State Board of Education virtually all of its discretionary authority to control common school curriculum. The crucial provisions are paragraphs sixteen, seventeen, and eighteen of A.R.S. sec. 15-102.[10] The text of these provisions appears unequivocally to establish Board dominance over common school curriculum. However, if the language is interpreted in light of traditional educational practices, then they can be said to contemplate a certain amount of concurrent state/local supervision. Before the early 1970's, state agencies had provided curriculum frameworks, but had allowed common school district officials to put a local imprint on the final product. The local people made choices of methodology and emphasis; they supplemented mandated texts with other materials and activities. Did they have a <u>right</u> to play this role, or were they merely benefitting from the permissiveness of the state officials? There are a few court cases and attorney general opinions which have found legal basis for some kinds of local autonomy.[11] But there has been no adjudication of a head-on clash between state officials trying to mandate the details of curriculum under the color of their sec. 15-102 powers, and local officials asserting the right to continue exercising their historic prerogatives to fill in the details of instructional content.

There <u>was</u> a sharp dispute on this precise issue in the early 1970's, but it was resolved by political rather than judicial action. The Board established curriculum commissions which began to write detailed syllabi and lesson plans which some Board members, probably a majority, intended

to adopt under A.R.S. sec. 15-120, thereby giving each excruciating detail the force of law. After several months of tense public hearings; of petitions, protests, and lobbying; the commissions began to pare down their reports and the Board announced that the commission syllabi would be only recommendatory insofar as they purported to be lesson plans.

During these controversies, in February 1974, Senate Bill 1300 was introduced. It would have transferred most Board powers to the Superintendent of Public Instruction, or would change them from mandatory to advisory status. The bill was approved by the Senate Education Committee but failed to pass in the full chamber.

There was, however, one amendment made to sec. 15-102(18) during 1974. It added this clause:

> "(A) school district may substitute a textbook for a prescribed textbook upon approval by the state board of education of an application for such substitution." (emphasis added)

Although the provision adds flexibility to the regulatory scheme, it confirms the premise that the state agency is decidedly senior to local districts in determining curriculum content. Until a measure like Senate Bill 1300 (1974) becomes law, the burden will be on the local actor in any particular dispute with state officials, to demonstrate his right to act without their approval.

b) Officials v. private persons

If local officials are at a disadvantage when they seek legal support for their opposition to state curriculum regulation, then private persons are all but absolutely deprived. Repeated campaigns by state teacher organizations have failed to achieve passage of a professional negotiations law. The Arizona Supreme Court has held that local districts

may collectively bargain contracts on a voluntary basis, but has also said that it will not specifically enforce the terms of any such contract.[12] Since the breach by a school board of a contract agreement pertaining to curriculum could not be adequately cured by a judgment for damages it is fair to say that teachers (as a group) have no legally protected role of any significance in making curriculum policy. Similarly, parents have no notable legal role as policy-makers by virtue of parental status itself. They are relegated to trying to influence events as electors or as elected officials.

c) Professional v. political

Arizona's authority structure has a relatively strong bias towards politicizing educational decision-making. The legislature recently moved further in this direction by revising the form of local school elections.[13] Prior to 1972, the election of school board members was a discrete activity, the voting took place on the first Tuesday in October of each year, and the term was three years. Now, the school campaigns coincide with general elections, board members being chosen for staggered four year terms. Some observors say the new arrangement encourages partianship and appeals to side issues which detract from reasoned consideration of educational problems.

The Board is appointed by the Governor, but the legislature structured Board membership in a way that seems to value political accountability at least as highly as collegial consultation among educational experts. Three seats are explicitly reserved for "lay members." Two others are held by elected officials (the Superintendent of Public Instruction, and a county superintendent). The remaining four seats are

designated in such a way as to suggest that the appointees are expected to represent specified organizational perspectives. These members are:

a member of the state junior college board;

a superintendent of a high school district;

a classroom teacher;

the president of a public university or state college.

The question of a proper balance between political accountability and professional expertise was vigorously disputed during the early 1970's. For example, Superintendent Shofstall tried to reduce the number of academic credits in the field of education required for teacher certification. He believed that incremental amounts of formal professional training did not substantially improve teaching capabilities. Also, the Board, with Shofstall's backing, tried to develop a performance-based method for certifying teachers. Both of these proposals were stymied by the resistance of professional groups and local officials. The Board expressed its notion about the proper balance between lay and professional participation in curriculum decisions when it provided that each of its textbook advisory committees (also known as curriculum commissions) consist of nine lay persons and eighteen educators, i.e. one-third lay membership.

2. Student classification

The legislature has taken steps to control the conditions under which public schools can discriminate between children with different mental and physical characteristics in giving them educational services. The education code defines nearly twenty categories of children. The consequence of a child fitting into any one category might be that the

school can segregate him from regular programs, excuse him from school attendance altogether, or, on the more constructive side, provide him with services especially designed to help him overcome his handicaps or exploit his special abilities.

The anti-discrimination element of these rules is more developed than the right-to-services side. The Special Education Act, for example, imposes extensive procedural conditions on any attempt by a school to categorize a child. On the other hand, the law imposes no duty to seek out and identify children with special needs, nor to actually provide them with special services. It permits the districts to offer special services, then establishes a scheme for regulating the programs which are offered, and offers partial reimbursement for program costs.

We have grouped the legislative classifications under three general headings: normal children in public schools, children identified by involuntary characteristics, and children who are in a category at least partly by choice.

a) Normal children in public schools. The usual presumption is that a child belongs in this category. The legislature has delegated to the State Board the authority to determine the general program of instruction for common school children, while leaving local school officials a greater amount of discretion to develop high school curriculum.[14] Because of this difference, we denote two separate categories:

1. Common school children (grades one through eight)
2. High school students (nine through twelve)

b) Involuntary characteristics.

Here, children are classified according to characteristics which nature, neglect, and accident have imposed on them. Most of these

categories are governed by the provisions of the Special Education Act[15] which was enacted in 1970.

1. Handicapped children
   (i) physically handicapped.[16]
   (ii) emotionally handicapped.[17]
   (iii) educably mentally retarded.[18]
   (iv) trainable mentally handicapped.[19]
   (v) speech handicapped.[20]
   (vi) multiple handicapped.[21]
   (vii) specific learning disability.[22]
   (viii) homebound or hospitalized.[23]
2. Gifted children.[24]
3. Students of limited English language ability.[25]
4. Children who are excused from school attendance because their physical or mental condition makes such attendance "inexpedient or impracticable."[26]

Categories one and four represent contrasting approaches to dealing with handicapped children. The former, a modern statute, encourages local districts to provide services suitable for non-normal children. The latter provision, part of a vintage compulsory attendance law, allows parents to be excused from the obligation of sending a child to school if the child does not benefit from normal instruction. By implication, the district is under no obligation to provide an expedient and practical curriculum for such special children. As special education services become more prevalent in Arizona, the fourth category will approach obsolescence, because schools will make available worthwhile programs to children with most kinds of disabilities.

The anti-discrimination theme mentioned in our earlier comments comes through clearly in this collection of statutes. A local district may treat any child the same as a "normal" child. If the district wishes to identify a child as exceptional, it cannot impose a label without complying with statutory procedures for pupil evaluation. Finally, if the district does legitimately identify a child with special needs, and intends to place him in special instruction, the special services must comply with the general statutory standard and with Board regulations promulgated to implement that standard.

c) "Voluntary" classification

The common feature in these categories is that the defining characteristic is, or could be, the result of a choice of instructional programs made by the child or his parents. The student's aptitude and health are not in issue.

1. Students being instructed at home by parents.[27]
2. Children over fourteen years old and employed (with consent of parents).[28]
3. Students attending non-public schools.[29]
4. Students in work training, career education, vocational or manual training programs.[30]
5. Students in Indian schools(?).

We place a question mark after the Indian schools category because it is unclear whether the legislature permits separate standards to govern curriculum in those schools. Under A.R.S. sec. 15-1161, the Board may contract with the U.S. Department of the Interior for the welfare and education of Indians in Arizona public schools. Probably, this provision impliedly authorizes the Board to agree to curriculum objectives for the

joint programs which depart from regular state requirements.

The first three categories are exemptions from compulsory school attendance. To qualify for an exemption, the alternative instruction must meet the standard stated in the law. This standard is examined in the final section of the Arizona chapter, Private Education.

The fourth category is a partial exemption from the compulsory attendance laws — it allows students who are enrolled in specific, statutorily authorized programs, to credit certain outside work activities towards hours of school attendance. The on-job experience must meet curriculum standards imposed by the relevant enabling statutes.

3. General Standards

The legislature has not enacted an authoritative model of the "educated" Arizonan. As we shall see in the following section, the legislature has from time to time mandated instruction in particular subjects that it thought all pupils should study but for the most part it has delegated control of content to state and local officials. On the input side, for example, educational spending is largely in the hands of local bodies, although state aid has an important impact; teacher certification standards are promulgated by the Board; the Board prescribes common school subjects and promulgates book lists from which local educators must choose.

Recently there has been legislative activity on the output side. In 1969, a law was passed requiring that all third grade children take a uniform reading achievement test each year, and empowering the State Superintendent to make older students take similar tests. In 1974, the legislature added the requirement that each year all fifth grade students

take a mathematics achievement test. These tests have been given, and the results have received wide publicity. In areas having large numbers of low-income families, non-English speaking children, and other conditions that are known to increase instructional burdens, educators complained that the publishing of bare test results caused unfair comparisons between districts.

During his term in office, Superintendent Shofstall urged a greater use of output standards, such as criterion reference tests. (In a criterion reference test the student is asked to perform integrated, practical tasks, such as writing a check, or filling out an income tax return.) He argued that these devices were useful tools for measuring teacher performance and a means for ensuring that students were learning practical skills. There has been no legislative follow-up on the idea. Shofstall's advocacy, however, has not led to any further legislative action in this area.

4. Specific Courses.

The Arizona legislature has mandated a few unexceptional courses in history, patriotism, and health. Also, in 1971, it passed a unique statute, requiring instruction in the "essentials and benefits of the free enterprise system." Implementation of the free enterprise requirement by the Superintendent ran up against stiff opposition by many local school officials, teachers, parents, and students. They opposed the course for a variety of reasons: it was dishonest, they said because it only presented the good side of free enterprise; it crowded more popular courses out of high school curriculums; it diminished local control of curriculum content. This chapter includes a case history of the free

enterprise implementation battle. That study traces the evolution and resolution of the dispute, and concludes that the legislature over-reached its ability to control events in the classroom when it enacted the free enterprise law in its present form. (See infra, at 230.)

Another legislative development worth noting is the interest Arizona law-makers have shown in "career education." The legislature encourages and finances career education programs and allows cooperation with the federal career education program; it recently passed a statute requiring that career education, when offered, must be integrated into regular program offerings.[31]

a) Miscellaneous mandated courses and activities:

(i) History, government[32]

> "All public schools shall give instruction in the essentials, sources and history of the constitutions of the United States and Arizona and instruction in American institutions and ideals and in the history of Arizona."

The State Board prescribes the teaching materials; at least one year of instruction given in grammar school and one year in high school.

(ii) Health[33]

> "Instruction on the nature and harmful effects of alcohol, tobacco, narcotic drugs and dangerous drugs (including marijuana) on the human system . . . "

This instruction may be combined with related subjects and needn't be a separate course. The State Board plays no part in determining the curriculum unless "requested" by the local district.

(iii) Reading[34]

> "(E)ach public school shall devote reasonable amounts of time to oral and silent reading in grades one through eight."

(iv) Flag display and patriotic exercises.[35]

b) Compulsory free enterprise instruction:[36]

> "All public high schools shall give instruction on the essentials and benefits of the free enterprise system."
>
> * * *
>
> "'(F)ree enterprise' means an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision rather than by state control, and by prices, production, and the distribution of goods that are determined in a free manner."

The law also provides that the instruction occupy at least one semester, the equivalent of one-half unit of credit. In 1972 the Superintendent issued a free enterprise syllabus setting out twenty-one basic course concepts. As of July 1974, the policy of the Superintendent's office was to consider a school to have satisfied the statute if it saw to it each student was instructed in the basic concepts at some point in their high school experience; a discrete free enterprise course did not have to be offered. Also, students were permitted to demonstrate their knowledge of the concepts by passing a standardized test, and thereby place out of free enterprise classroom instruction.

c) Optional courses, career education

Inbetween the courses mandated by the legislature, and the courses made mandatory or optional by the Board, lay a group of subjects which, because it is so provided by statute, may be offered by local districts at their discretion. These include:

(i) manual training, household economics, kindergarten.[37]

(ii) use of firearms.[38]

(iii) adult education.[39]

(iv) bi-lingual education.[40]

(v) special education.[41]

There are several other statutes which authorize optional subjects pertaining to occupational counseling and training.[42] It is not easy to sort out the overlap in these provisions because they do not use a uniform terminology. The Department of Education attempted to fashion a coherent policy out of the laws in a position paper, "Arizona Work Education" (undated). Within the general concept of work education it distinguished among three levels of instruction:

a. Work exposure -- opportunity to visit job sites; non-productive and non-paid.

b. Work experience -- students in grades 9-12 perform tasks on actual job; school assists in supervision; pay or no pay; no related school class required.

c. Cooperative education -- students in grades 11-14; on-the-job training coordinated with required classroom instruction; attempts to put together a comprehensive course of study and work preparing student for a career.

The career education statute, A.R.S. sec. 15-1199, combines all three levels. It is the most modern and comprehensive work education program. It's concept has been developed and promoted by the National Institute of Education. By the end of 1974, twenty-five state legislatures had authorized career education and appropriated funds for them. Arizona has appropriated over $10 million in four years.[43]

The reason for drawing special attention to the career education statute is that some proponents consider career education to be not

merely another good supplementary program, but rather, the framework for restructuring public education. The program, according to former Superintendent Shofstall, is that

> "[B]oth our high schools and our liberal arts colleges have become practically sterile because educators have failed to accept the fact that the 'rigid separation between general-academic education and vocation-technical education' is no longer functional."[44]

According to Shofstall, the most important role of the public education is to prepare young people to make the best of the labor market.

> "There is no other legitimate reason for education than preparation for a career."[45]

> "Career education is a way of . . . enabling the student to take his place in society. . . . (I)t provides for increased awareness of self and for positive attitudes towards others. . . ."[46]

If the legislature were to adopt Shofstall's views on career education, it could lead to a substantial change in Arizona school curriculum. One would expect protests from persons defending the intrinsic worth of academic study, and those who thought that it was as important for schools to teach young people how to criticize and improve existing institutions as to prepare them to fit into whatever occupational niche might be available for them. In its present form, however, the statute makes no revolutionary pretenses.

III. State Agencies

At the statewide level, supervision of public education is vested in a Board of Education (Board), a Superintendent of Public Instruction (Superintendent), and a Department of Education (Department). The Governor appoints Board members with the Senate's consent. The Superintendent is elected to a four year term that runs concurrently with the governorship. The primary job of the Superintendent is said to be the effectuation of Board policy; the Department is his administrative arm.

This governing structure creates a tension between the Superintendent's administrative function as the executive officer of the Board, and his political role as a holder of a statewide elected office. For example, he may be elected in November because he campaigned against sex education, and then find himself instructed by the Board in January to develop a sex education curriculum. As an ex-officio member of the Board he has a forum for trying to persuade his co-members to abandon the idea, and he has one vote to cast against it. But he has no right to veto, subvert, or decline to help implement the course of study.

The Board, on the other hand, has no right to fire the Superintendent if it is dissatisfied with his performance. Thus, as a practical matter, the Superintendent can bias his management of the Department's resources to serve his own purposes without fearing that a death blow may fall on him at any moment.[1]

These confusingly juxtaposed institutions are charged with administering a grant of supervisory authority over curriculum which is as broad as any in the nation. The statutes conferring these powers have been in force since Arizona attained statehood in 1911. Only recently

did the Board try to exercise this control in a comprehensive and purposeful manner. This new stance aroused bitter opposition from:

a) teachers and other educational professionals, their regular organizations, and ad hoc organizations formed to contest specific issues;

b) "liberals," especially members of the Arizona Civil Liberties Union;

c) moderates and conservatives concerned about infringements on local autonomy.[2]

The controversies generated by the Board's sudden activism repeatedly raised questions about the legal prerogatives of state agencies vis-a-vis one another and vis-a-vis the districts. When these disputes were resolved at all, it was by political processes, not by judicial action. Consequently, at several places in this chapter we use narrations of current events in lieu of case citations, because they are, as yet, the closest approximations of what the law is.

* * *

The balance of this section is divided into four parts:

A. General powers of state agencies;

B. State control of school personnel;

C. State prescriptions of courses of study;

D. State selection of textbooks.

For more discussion of how state power is sometimes limited by statutory grants of power to local districts, see Section V.

A. General Powers

The interlocking powers and duties of the Board, Superintendent and Department of Education are set forth as follows:

1. The Board shall,

"14. Exercise general supervision over and regulate the conduct of the public school system." A.R.S. §15-102.

"8. Delegate to the superintendent of public instruction the execution of policies decided upon." A.R.S. §15-102.

2. The Superintendent shall,

"1. Superintend the public schools of the state." A.R.S. §15-121.

"7. Direct, under general rules and regulations adopted by the state board of education, the work of all employees of the board who shall be employees of the department of education." A.R.S. §15-121.

A.R.S. §15-121.01, entitled "Executive Authority", was added to the Code in 1970, and provides:

"A. The superintendent of public instruction shall execute, under the direction of the state board of education, the policies which have been decided upon by the board."

"B. The Superintendent . . . shall direct the performance of executive, administrative or ministerial functions by the department of education or divisions or employees thereof."

3. The Department of Education is "administered through" the Board and Superintendent. A.R.S. §15-111.

a. The Board is the "governing and policy determining body of the department."

b. The Superintendent is the "executive officer" of the Board, and in him are vested all "executive, administrative and ministerial functions of the department."

These sections hardly describe the prerogatives of the state agencies; rather, they let those powers hang on the definitions of such terms as "superintend", "regulate conduct," "executive function." Overlapping authority patterns can have the virtue of forcing institutions charged with similar responsibilities to try to achieve consensus on

important policy questions. However, if no one body has the ultimate say when consensus fails to materialize, disputes can fester indefinitely.

Arizona is vulnerable to interminable conflicts between the Board and Superintendent because the supposed ultimate authority of the Board is not exercisable in any direct and practical form.[3] The Board could try to lock-in the Superintendent to the proper execution of its policies by enacting extremely detailed rules. Too much detail, however, would arguably invade the Superintendent's legally protected role as executive officer and manager of state level educational activities. Since the Board cannot dismiss the Superintendent, its most extreme discipline option would be to institute a mandamus action against him under its authority to see that the school laws are properly enforced.[4] The Board could not lawfully circumvent the Superintendent, purporting to assume direct control of some or all Department programs, because of A.R.S. sec. 15-111(D), which provides,

> "The department shall be conducted under the control of the state superintendent of public instruction."

Putting aside the question of internecine feuds at the state level, what authority could a united front of Board and Superintendent use to keep a recalcitrant local board in line? According to the Attorney General, state officials cannot close down schools run by a local district. However, they can:

a) withhold state aid funds if after notice and hearing before the Board it is determined that the district is not complying with statutes or binding policies, and/or

b) institute court proceedings against local officials.[5]

The use of either option requires that the state demonstrate the unlawfulness of specific local actions. If a board resists a state policy

through a pattern of technically legal conduct, the Board or Superintendent might try to find a political remedy. Gerrymandering districts is one possibility. Recently, supporters of local autonomy charged that the Department was using redistricting (or the threat of it) to dismember districts that had been especially effective champions of local control.[6]

Arizona's constitution and education code do not state a theory about the institutional competencies and representational functions of state and local agencies.[7] There has been a discernible movement, however, towards building into the governance of education more control by lay persons. A 1964 constitutional amendment designated three Board seats to be reserved for lay members only. It also allowed the legislature to compensate members for their services.[8] (This is of benefit to lay persons because professional educators almost always will be given paid leave from their work to perform Board functions, but a factory manager or a self-employed businessman frequently will have to sacrifice income to serve as a member.)

In the early 1970's there was a continuous battle between "lay" and "professional" viewpoints in Arizona school politics. The 1964 amendment may have made it easier for an anti-professional faction to gain control of the Board, but it probably would have happened anyway. The elected Superintendent, himself a professional educator, was one of the most vociferous proponents of increased lay control of school curriculums. Governor Williams, who appointed the Board, had similar views. Among the ideas proposed by the Board and Superintendent were these:

a) reducing the amount of college and graduate study required to be certified as a teacher;

b) making continued certification contingent on passing "performance" tests;

c) appointing commissions to write detailed curriculum guidelines which rejected many of the premises of the social sciences;

d) appointing curriculum commissions whose members were intent on mandating the use of traditional teaching methods (especially in reading) and prohibiting instructors and their supervisors from using more modern methods.

The lay v. professional conflict can raise interesting problems of statutory interpretation. Increasingly, the legislature is using terminology which can be said to have a precise technical meaning, which is incorporated into the statute by implication, and it is relying on professional tools, like standardized achievement tests. For example, a recent amendment to A.R.S. sec. 15-102, adds paragraph 25, which provides:

> "The board shall assist in the development of alternate learning procedures to help pupils attain their individual learning expectancy levels [in reading, writing and computation skills] based on intelligence factors, achievement factors and teacher evaluation." [emphasis added]

The paragraph is full of technical terms, and phrases which have, arguably, a technical meaning. An example of the latter is the wording, "alternative learning procedures." The language arts curriculum commission appointed by the Board in 1974 was dominated by a traditionalist

faction which stated its intention to recommend guidelines which would only allow the adoption of reading textbooks using the conventional version of phonics instruction.[9] If the Board had adopted such guidelines, objection could have been made that this purported exercise of the Board's powers under paragraphs 16-18 of A.R.S. sec. 15-102, was actually ultra vires because of the above-quoted phrase in paragraph 25 of the same section. That is, it would be argued as a matter of professional knowledge that there were many valid and valuable methods for teaching reading besides the conventional phonics approach. Therefore, the Board violated its duty to develop alternate learning procedures when it prohibited or hindered instructors from using any modern reading methods.

B. Control of school personnel

The Board has the power and duty to establish qualification standards for professional and non-professional school personnel. By denying, suspending, or revoking teaching certificates, it can directly affect classroom-level activities. In the few situations in which such actions have been challenged, the Attorney General and the courts have upheld the Board's discretionary actions.

The statutory basis for control is found in these provisions:

1. A.R.S. §15-102:

"The state board of education shall:

* * *

20. Supervise and control the certification of teachers and prescribe rules and regulations therefor. 'Teacher' . . . means a person engaged in instructional work directly, as classroom, laboratory or other teacher, or indirectly as supervisory teacher, speech therapists, principal or superintendent, in a public common or high school.

21. Supervise and control the qualifications of professional nonteaching school personnel and prescribe standards relating to qualifications.

* * *

23. Revoke all certificates or life diplomas for immoral or unprofessional conduct or for evident unfitness to teach." [emphasis added]

2.) A.R.S. §15-201.

"Every teacher shall:

* * *

3. Enforce the course of study, use of adopted textbooks and the rules and regulations prescribed for schools.

4. Hold pupils to strict account for disorderly conduct on the way to and from school."

3.) A.R.S. §15-208.

"A teacher who fails to comply with any provision of this chapter is guilty of unprofessional conduct and his certificate shall be revoked."

In 1971, the Board requested advice on the question whether it could revoke the certificates of striking teachers, on the ground that striking was "unprofessional conduct." The Attorney General's answer first limited itself to a specific fact situation -- where striking teachers are presently under contract to provide services to the district, and that the dispute is over the terms of the next year's contract. Finding no statutory right to strike under those circumstances, the Attorney General reviewed the case law and concluded that such a strike was unlawful. As to whether the unlawful behavior was "unprofessional," the Attorney General said:

> "We feel that in addition to the statutory grounds for revocation [under §§15-201 and 15-208] the Board has inherent power, by the terms of A.R.S. §15-102, to define what shall constitute unprofessional and immoral conduct or evident unfitness to teach, and may discipline holders of teaching certificates accordingly.... [T]he Attorney General may not invade the jurisdiction of the Board by attempting to define unprofessional acts as a matter of law." Op. Att'y Gen. 71-12, at 28-29.[10]

The definition of "teacher" in A.R.S. sec. 15-102(20) includes administrative personnel. In a recent case involving a district superintendent, the Court of Appeals upheld a Board order revoking the person's administrative certificates and indefinitely suspending his teaching certificates. Kimball v. Shofstall, 17 Ariz. App. 11, 494 P.2d 1357 (1972). The court found that there was substantial evidence that Kimball had acted dishonestly and ineffectively in the course of his official duties. He had secured the employment of teachers' aides to be paid out of Title I funds when there was no pending application for such funds; he had made representations to the School Board that such an application existed; and finally, he had made a late application which included representations that were not based on fact. At another time Kimball had represented that he had a master's degree when in fact he had none.[11]

There are as yet no cases or advisory opinions which reject a Board construction or application of the controlling terms in the statutes quoted at the beginning of this discussion. Nor is there any mention of defenses that might be relied on by teachers. Suppose, for example, that a teacher teaches a lesson with the approval of the local school board, and the State Board institutes revocation proceedings inquiring into whether teaching the lesson was immoral or unprofessional. Is the board's approval a defense? Can the board "take the heat" in disputes

with state agencies, or is the option open to the latter to try avoiding a direct confrontation with the district board by striking out directly at teachers?

Even if the district could intervene in the revocation proceeding, the problem remains for the teacher that if it is determined that the board's approval of the lesson was unlawful, then she may lose her certification -- a powerful sanction. There seems to be room in this area for a construction of "unprofessional" which excludes actions taken by an employee who reasonably believed a) that the action was approved or would be approved by her supervisors and/or the local school board, and b) that such approval would be a lawful exercise of authority by those officials.

Although the rule-making and quasi-judicial powers of the Board in certification matters appears very broad, there are limits to its ability to implement policy by promulgating rules and deciding cases. Thus, a major state effort to change the method of teacher certification and renewal has recently foundered on the rocks of non-cooperation among local agencies and professional organizations. Superintendent Shofstall and the Board were eager to overthrow formal education as the primary determinant of one's ability to teach and to replace it with an evaluation of what a teacher's students had learned. A teacher would be conditionally certified, pending proof of on-the-job competence.

The state's first step in this direction would have been to reduce the number of academic credits required on applicants' records. This proposal triggered a furious outcry. Professionals argued that Arizona would be lowering the quality of its teaching corps at a time when other states were upgrading theirs, and that the state should take advantage

of the current teacher surplus by only accepting the most qualified applicants. (This argument assumed that an extra year of formal education almost always significantly upgraded one's teaching abilities, a premise rejected, at least in part, by Shofstall. Also, one could make the cynical argument that some of the opposition was motivated by the desire of those who had already acquired graduate training to protect their competitive position in the job market.) Eventually, the Board abandoned its plan to cut back on academic credit requirements.

Theoretically, the Board could have damned the torpedoes and changed the credit requirement despite the opposition. The execution of the change would have been simple and swift -- applications for teaching certificates would have been accepted from persons who would not before have been qualified. By contrast, implementation of the Board's second reform -- performance-based certification -- would have been much more difficult both in theory and practice. To begin with, no one knew how such a system would operate. Consequently, the Board instructed the Department to design a procedure; and to test it in pilot programs.

No governing board of any size agreed to be a test site for a model evaluation program. Frustrated Department officials (who had been trying to set up the pilot program) charged that the plan had been "sabotaged." They accused the Arizona Education Association of being the instigator of the obstructionism.[12] In July 1974, Superintendent Shofstall -- one of the earliest proponents of the plan -- announced that the experiment was dead. Surprisingly, the Board refused to accept Shofstall's verdict, and stated its intention to somehow move ahead with performance certification.

The legislature put in the final word in the debate. In 1974 it enacted a statute[13] which required that each school district in the state develop and adopt,

> "objective assessment and evaluation guidelines for the improvement of instruction."
> A.R.S. sec. 15-268(A)

The Board is given no role in this program other than to report to the legislature by January 15, 1978, that each local district has complied. Apparently, a district complies by filing a description of its system with the Board by June 30, 1977. Unlike other recent statutes instituting new programs in public education (e.g. the Special Education Act, the Bi-lingual Education Act) which expressly authorize the Board to enact guidelines and standards binding on local boards, this statute grants no such power. The statute itself does contain two general guidelines. Presumably, the Board could reject a board filing which clearly violated these standards. The statute requires that the locally developed procedures contain these elements:

> "1. The establishment of criteria of expected teacher performance in each area of teaching and of techniques for the assessment and evaluation of that performance.
>
> 2. Assessment and evaluation of competence of certified teachers as it relates to the established criteria."
> A.R.S. sec. 15-268(D).

The statute follows the views of those who opposed the Board in the performance-certification debate. The key points are these:

1. The evaluation is not directly connected to the certification process. There is no period of provisional certification pending the outcome of a performance evaluation.[14]
2. Copies of assessment reports are confidential, and cannot be released except in the case of certain official actions.

Parents, for example, would have no right to see the evaluations of the teachers of their children.

3. The governing board must "avail itself of the advice of its certificated teachers" in developing its system.
4. There is local autonomy to develop any procedure it deems suitable to its needs, so long as it satisfies the very general statutory guidelines.

C. Control of subject matter, materials and methods

The law examined in this section is at the heart of Board authority to control curriculum content. It involves the nature and extent of the powers delegated by statutes providing that the Board shall prescribe courses of study, optional courses, subjects of instruction, and textbooks. The general issues are:

a) How far may the Board go in determining the details of classroom instruction? (Examples: Can it require what methods must be used to cover a given subject? what topics may or may not be discussed? how much time must be devoted to one or another subject? what textbooks and supplementary materials can be used at all, and how heavily they can be relied on?)

b) What is the role of the local school board and local educators in the statutory scheme of curriculum control? To what extent is the historical role of Arizona school boards -- filling in the details of very general curriculum frameworks promulgated by the Board -- also a legally protected function?

c) How creatively can the Board exercise its statutory powers to achieve results that are not specifically mentioned in any statute?

Examples: Can the Board prescribe so many mandatory subjects that the local board, as a practical matter, has no opportunity to fill out the state curriculum with topics of its own choosing? Can the Board make conditional mandates -- e.g. "If you teach evolution then you must also teach the creationist theory"?

There are many intricate interrelationships among the materials that bear on these issues. Also, the process of interpreting them raises several methodological problems. Because of the difficulty of keeping so many issues in mind at one time, we have tried to outline or diagram the main points made in each part of this section. Subsection one deals with the use of course descriptions, syllabi and the like, to control what goes on in the classroom. Subsection two examines textbook selection -- state authority to affect the curriculum by regulating the materials that teachers use. The discussion in subsection two of the politics of textbook selection illustrates the challenges that have recently been made to the historic curriculum-determining role of local boards. It is relevant not only to the question of the Board's textbook selection powers, but also to the powers (to prescribe courses) analyzed in subsection one.

So far as substantive law is concerned, any purported exercise of authority by the Board is subjected to three tests:

a) Is there an express or clearly implied grant of this power to the Board? A grant of authority must be found because the Board has no inherent authority. This is because the courts have interpreted the Arizona Education Code so that it includes a restrictive presumption of Board authority. (Arizona presumptions are analyzed in this chapter at 173 ; the general question of education code presumptions is

examined in chapter 5 . at 173 .)

b) Even if there is an explicit or colorable claim of Board authority, is there also a countervailing grant of authority to local boards (or other persons) which will be interpreted as limiting the Board's power?

c) Irregardless of the state law foundation for the Board's action, does the federal constitution render it unlawful?

In short, the three basic propositions used to upset a Board action are that it is ultra vires, it is contrary to the statutory authority of a local board, or it is unconstitutional. In the course of formulating and proving any one of these propositions one is likely to encounter several methodological problems. Among them are:

a) The important Arizona statutes are brief, ambiguously worded, and without adequate judicial elaboration. Consequently, many of the arguments used in our analysis rely on statutory interpretations which are logically sound but not definitively authoritative. The problem is compounded by the fact that these provisions, in their majestic simplicity, can be rationally interpreted to support or deny many key arguments. If we did not speculate about interpretations, however, we would have nothing to discuss. The reader must keep in mind which interpretations are ours and which are those of the courts or the Attorney General.

b) Because of the brevity and ambiguity of the statutes, the courts and Attorney General have often grounded their decisions on supposedly "key" phrases, or on inferences of legislative intent drawn from statutes which are not very closely analogous. When a judge must decide a case, or a state attorney answer a question, he prefers using a

shaky authority to none at all. Otherwise his decision appears to be nothing but a guess or a policy judgment. One phrase which bears a lot of weight in our analysis is "other special subjects." It is used as a source of local authority to give instruction of a kind not mentioned in the Board's mandatory and optional lists.[15]

c) In order to develop a theory of the role intended by the legislature for the local board in curriculum regulation, it is necessary to piece together the past practices in the education system, and phrases and inferences from asserted statutes.

d) In the present discussion, we note constitutional issues when they are relevant, but forego detailed analysis, because that is reserved for a separate chapter dealing only with constitutional issues.

* * *

The Board's power to regulate curriculum in the common schools is much broader than its authority over high school instruction. Whereas the Board prescribes the course of study for the common schools, each high school board of education prescribes its own course of study -- "subject to approval by the state board of education." A.R.S. sec. 15-545. Any attempt by the Board to take the curriculum planning initiative away from the high school board by using its power of "approval" would contradict the clear intent of the legislature to give the Board a primary role in common school curriculum and a secondary role in the high school curriculum. Exceptions to this legislative scheme are explicitly embodied in statutes. For example, when the legislature passed the free enterprise law, it charged the Board with developing and prescribing a course of study.[16]

Thus, both the planning and execution of high school instruction are concentrated at the local level. By contrast, common school curriculum is planned, to a great extent, by the Board, and is executed by the local officials and educators. It is the latter arrangement which has given rise to the most legal confusion and political discord. Consequently, the focus of this section is the common school curriculum.

As a general rule, the Board has the authority (and duty) to prescribe curriculum guidelines for the common schools. It may not, however, impose detailed instructional formats. What is the dividing line between "guidelines" and "details"? Ordinarily,the most detailed, formalized description of classroom instruction is the individual teacher's lesson plans. It is usually required that they be complete enough that a substitute teacher can step in and conduct most of the day's lessons. If the Board mandated lesson plans which trivialized the discretion of the teacher -- in effect turning the regular teacher into a "substitute" for the Board -- that would certainly be more than a guideline.

Above the lesson plan there are a variety of curriculum planning tools. Whether one is properly said to contain guidelines, or details, must be decided on a case-by-case basis. A school's fourth grade program might provide for eighty minutes of science each week; the science syllabus, (or the table of contents of the adopted science textbook) might suggest a six week unit on biology within the science program; the teacher's lesson plans might break down the biology unit into a two-week study of the life cycle of the salmon, a three-week study of plant reproduction, and a one-week study of human nutrition. Clearly, the Board can make science a part of the fourth grade course of study. Also, it would probably include some minimum time requirements, so long as they

were reasonable and were not part of a scheme of regulation designed to further some unauthorized end (e.g. occupying every minute in the school day so no time would be left for optional subjects). Once the Board started saying (as in the syllabus) how much time within a course had to be devoted to a subtopic, it would probably be in a forbidden area of detail. And lesson plan detail, as we have said, would definitely be out. Analogous spectrums ranging from "guideline" to "detail" could be made up for other elements of instruction. Instead of time, for example, one could focus on methods of classroom organization, ranging from "open" to self-contained. There is an enormous number of variables, and in the absence of legal precedents there is nothing definitive that can be said about the guideline/detail distinction, except to point out its importance, and the difficulty of applying it.[17]

In addition to its authority to mandate instruction, the Board has a limited power to prohibit the teaching of certain topics. It can prevent the use of partisan or sectarian materials, and in some circumstances, it can exclude a topic by a) systematically omitting any mention of it from its guidelines, and b) adopting no textbooks that cover it. The scope of this power is restricted by the absence of any direct statutory grant of prohibitory powers. In addition, federal constitutional law plays a multifaceted limiting role. On the one hand, the state can be <u>obligated</u> to prevent the teaching of a sectarian subject because having such a course would constitute an establishment of religion. On the other hand, <u>preventing</u> the teaching of some other topic, e.g. evolution, can be a forbidden establishment of religion or an infringement of freedom of speech.

Besides being able to mandate some subjects and prohibit others,

the Board probably has some authority to promulgate procedural rules regulating the way in which local educators exercise whatever discretion has been allowed them in filling out the curriculum. For example, the Board might adopt a rule stating that whenever a controversial subject is studied, that all the major points of view in that area be fairly represented in the instructional materials.

We refer to probable authority as the power to establish "rules of discourse." We say "probable," because the power is grounded in neither grant of power, nor court decisions, nor political experience. In our constitutional law chapter, we note that a respectable argument can be made that the free speech clause of the First Amendment imposes an obligation on the Board to treat controversial issues "fairly." If there is such a constitutional requirement, it would, of course, also attach to other state actors -- e.g. the legislature and local districts. This is the source of one argument against the constitutionality of the free enterprise law.

We will now examine in more detail these three kinds of curriculum control -- mandating subjects; prohibiting subjects; establishing rules of discourse. The discussion can be broken down into six topics, which are shown in the accompanying diagram. These topics are summarized in a set of six outlines.

Applicable Law / Nature of Authority	State	First Amendment
Mandate courses and subjects	I	II
Prohibit courses, subjects, topics of discussion	III	IV
Establish rules of discourse	V	VI

Curriculum Control by State Board of Education

Outlines of Six Legal Issues

I. Board authority to mandate courses: State law

A. Sources of authority

1. General legislative scheme -- a few statutorily prescribed courses and a broad delegation to the Board of authority to determine curriculum framework.

2. Basic enabling provisions:

sec. 15-102, paragraphs 15 and 16.

3. Obedience to Board required by law

a. local board duty to enforce course of study, sec. 15-442, par. 2.

b. teacher's duty to enforce course of study, sec. 201, par. 3.

B. Limitations on authority

1. Local board authority to offer "other special subjects" sec. 15-448(A)(3).

Att'y. Gen. Op. 61-16 (1961).

2. State Board must prescribe not only mandatory, but also optional subjects. sec. 102, par. 17.

3. Statutory provisions which point to legislative intention that there be some diversity and choice within the Board framework. sec. 102, paragraph 18:

a) no less than three textbooks must be adopted for each subject.

b) recent amendment allows district to substitute for prescribed textbook with Board permission.

c) although no more than five textbooks to be adopted for each subject, legislative purpose may well have been economic, rather than intention to severely limit local choice. (See, "Economics of Textbook Selection," infra at 100).

4. Statutes require obedience to Board's course of study, but silent about obedience to "subjects of instruction." sec. 15-102, par. 16, sec. 15-442, 15-201.

5. Essential role of local districts in legislative scheme — takes part in shaping curriculum and deciding details. Board may not mandate so many subjects that no local choice is left; may not act to render statutory right to offer special subjects meaningless.

6. Restrictive presumption of state agency authority.

II. Board authority to mandate courses: Constitutional issues

A. Board mandates can be supportive of constitutional rights and values

1. Fundamental right to basic minimum education. Board prescribes suitable subjects, establishes achievement level standards.

2. Possible federal rights to special educational services which provide access to public instruction to children who otherwise would not benefit, e.g. special education, bilingual education.

B. Constitutional limits on state power

1. Establishment Clause. (remedy is to root out the unconstitutional practice)

2. Free Exercise Clause. (remedy is to excuse from participation those persons whose religious beliefs are offended)

3. Free Speech Clause
Board may not indoctrinate in controversial areas.
(remedy: hear other side? excuse students from courses?)

III. Board authority to prohibit courses: State law

A. Sources

1. Duty to eliminate partisan or sectarian ideas.

sec. 15-442(A)(5)

sec. 15-203 (teachers)

Att'y Gen. Op. 72-27-L (1972)

2. Power to make a general ban on sexual and ethnic stereotypes is doubtful. (However, can establish a policy binding on adoptions of textbooks.)

3. Indirectly prohibiting a subject by manipulating powers to mandate subjects and adopt texts in such a way as to systematically omit mention of that topic.

Att'y. Gen. Op. 64-2.

B. Limits

1. No explicit authority to prohibit (Att'y. Gen. Op. 64-2) plus restrictive presumption.

2. Statutory protection of local discretion -- "other special subjects;" intention that there be local discretion implied from optional courses.

IV. Board authority to prohibit courses: Constitutional law

A. Board action supportive of constitutional values -- restrictions on partisan or sectarian material

Establishment Clause

Equal Protection Clause

B. Limitations

1. Establishment Clause -- if course is prohibited for purpose of advancing a sectarian doctrine. Epperson, majority opinion.

2. Free Speech Clause

a. state cannot prevent mention of major system of ideas. Epperson, Stewart concurring opinion

b. least restrictive alternative argument -- even if a legitimate state purpose, prior restraint of ideas is not usually a necessary means of achieving it.

3. Substantive Due Process. right to learn. Meyer v. Nebraska.

V. Board powers to promulgate "rules of discourse:" State law

A. Sources

1. General supervisory powers. sec. 102, par. 14.

2. Derived from power to mandate specific courses and subjects. Instead of prescribing, "teach X," or "teach Y," rule says:
"If you teach X, then you must also teach Y"
("If you teach Marxism, you must also teach one theory critical of Marxism.")

B. Limitations

1. Restrictive presumption of education code. Even though the conditional rule, "If X, then Y," is logically derived from the powers to prescribe courses, it is still a surprising interpretation of the language of the enabling

provisions. Therefore cannot assume it was intended by legislature.

2. The rules cannot impinge on independent authority of districts over "other special subjects."

3. Rules can't impose on general role of districts in legislative scheme to fill in the details of curriculum.

4. Rules of discourse would operate as ad hoc state supervision of local curriculum -- statutory scheme contemplates very deliberate form of state action, with clear warning to local districts about what is required of them.

VI. Board powers to promulgate "rules of discourse:" Constitutional law

A. Board action supportive of constitutional values -- rules of discourse are method of guarding against indoctrination in the schools.

B. Constitutional limitation

Free Speech Clause. If Stewart's view is taken, then Board cannot prevent mention of, for example, Marxism, in school. It follows, that neither can the Board attach so many conditions to the mention of Marxism that the conditions amount to a de facto prohibition. However, reasonable conditions can be attached. A condition is probably reasonable if it acts as a guarantee that the subject will not be taught in an indoctrinatory manner.

I. Board authority to mandate courses: State law (see outline I)

The Backdrop to the Board's prescriptive powers includes: a) statutorily mandated instruction in history, civics, economics, and health, and b) the legislatively imposed duty of the Board to create local curriculum options. Besides the optional courses that the Board may designate, the legislature has directly authorized boards to offer instruction in manual training, household economics, kindergarten, special education, bi-lingual instruction, career education. The Board's discretionary authority to shape the balance of the curriculum is relatively broad, but still is subject to this framework.[18]

A.R.S. sec. 15-102 provides in part:

> "The state board of education shall:
> * * *
> 15. Prescribe and enforce a course of study in the common schools.
> 16. Prescribe the subjects to be taught in the common schools." [emphasis added]

The widest reading of paragraph sixteen is that the Board can (or must) map out one hundred per cent of each pupil's school day. The clause directs the Board not merely to prescribe some subjects, but "the" subjects. Furthermore, the legislature has backed up the Board's prescriptive powers by imposing on local actors clear duties of compliance. Local boards must enforce the course of study. A.R.S. sec. 15-442(2). Teachers must enforce the course of study. A.R.S. sec. 201 par. (3).

These provisions at first appear to supply the Board with power to determine what we have called curriculum "details." However, that broad a construction of the basic enabling provisions cannot stand. Other enactments make it clear that the legislature did not intend to authorize the Board to prescribe a curriculum straight-jacket. First,

paragraphs fifteen and sixteen of sec. 15-102 must be read in conjunction with paragraph seventeen. The latter commands the Board to

"(p)rescribe a list of optional subjects. . . "

Thus, the Board's mandatory scheme of instruction must leave time for teaching subjects chosen from the optional list. If the Board made the mandatory requirements so sweeping, and the options so limited, as to make a mockery of the idea of local choice, a court could interpret paragraph seventeen to require the Board to adopt an optional list of reasonable length, and a mandatory list that left time for a reasonable number of optional courses. To determine what constituted a "reasonably broad" selection of alternative subjects, the court could look to educational practice and trends in the nation (perhaps with special attention to school systems similar to Arizona's).

Second, the right to local options finds support in A.R.S. 15-102(18), the textbook selection provision. The Board may not adopt just one textbook for a given subject. Rather, it must adopt at least three (and not more than five) for each subject and each grade. That requirement would be meaningless if the Board were allowed to adopt three (or four, or five) virtually identical texts. The legislature had in mind giving local educators some discretion in shaping course content -- in this case by giving a choice among different kinds of textbooks. The initial Board screening enforces a state-wide minimum quality standard, and keeps books purchased with state funds (common school purchases of mandated textbooks are reimbursed) synchronized with the general state-wide course guidelines. The purpose of the five book maximum may have been to give Arizona market power vis-a-vis publishing companies by concentrating its orders in a relatively small number of large purchases. (See sub-section two of this section, part B, The Economics of Textbook Selection,

infra, at 100).

Further evidence of a legislative intent that state textbook adoption powers should not be an unnecessarily difficult obstacle to local initiatives, is contained in a recent amendment[19] to paragraph eighteen. It provides,

> "that a school district may substitute a textbook for a prescribed textbook upon approval by the state board of education of an application for such substitution."

Unfortunately, the failure to mention any criteria for evaluating an application for a textbook substitution keeps alive most of the guesswork about the precise scope of the Board discretion.

Third, local boards have direct authority to offer "special subjects," under A.R.S. sec. 15-448 (B). It allows them to:

> "[e]mploy special teachers in drawing, music, domestic science, training, kindergarten, commercial work, agriculture and other special subjects." [emphasis added].

The Arizona Attorney General has construed this section to give district trustees the right to hire a person to teach foreign languages in the elementary schools. The opinion assumed that the hiring power was not contingent on the foreign language course appearing on a state approved list. Rather, it states that the right to give the course is "in addition to the powers conferred upon [the Board]. . . ."[20] In a 1927 case, (Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056) "other special subjects" was held to include physical education. The phrase lends itself to a judicial interpretation that takes into account serious trends in educational thinking and practice. The legislature's use of the term "special" strongly suggests that it was interested in protecting innovative efforts. (By comparison, the requirement that the Board

prescribe "optional" subjects would not prevent the Board from systematically excluding experimental courses from its list, so long as it still gave a choice among several conventional courses.)

Fourth, the three statutory provisions that create duties to "enforce" state curriculum requirements mention the "course of study," without stating a correlative duty to enforce the "subjects of instruction."[21] The omission is especially apparent in paragraph 16 of sec. 15-201, because paragraph 15 is strictly parallel in form and includes the words, "and enforce."[22] At the most, the failure of the statutes to mention enforcement of the subjects of instruction can be interpreted to mean that the legislature intended that the Board's list of subjects be recommendatory rather than mandatory. That view, however, does violence to the ordinary meaning of the term, "prescribe," and of the phrase "the subjects." It is more likely that the drafters intended "the course of study" to refer to general curriculum guidelines, and meant "subjects of instruction" to refer to more discrete and detailed components of the curriculum. Since the Board's authority to determine details was to be shared with the local boards, the lawmakers did not enact any compliance statutes which would appear to make teachers and boards entirely subservient to Board decisions in the realm of detail. As long as the Board defines its prescribed subjects in general enough terms, the governing boards and teachers will have a legal obligation to "enforce" them. This is clearly implied by the statutory scheme. On the other hand, they would have no duty to enforce overly detailed content specifications.

Fifth, the Board may not prescribe curriculum content in such a form that there is no room left for the exercise of local discretion.

This proposition is deduced from a) our earlier points about the legislative intent that there be real options from which boards can choose, and b) the direct statutory protection of local choice included in the "other special subjects" clause.

Sixth, and finally, the education code's restrictive presumption can be thrown in the balance in any difficult case, as a grounds for deciding against the Board's claimed authority. For example, the presumption strengthens the argument that the Board may not indirectly eliminate virtually all local discretion. Such an extreme power will not be implied from a general enabling provision. It is also possible to use the restrictive presumption offensively, imposing a duty on the Board. For example, it can be argued that since there is no statute giving the Board the authority to indoctrinate students, the Board must prescribe curriculum in a manner that brings out all major points of view on controversial subjects.

II. Board authority to mandate courses: Constitutional issues

(see outline II)

Although the United States Constitution is not a source of any specific Board powers, some Board mandates can at least be said to be supportive of constitutional rights and values. For example, the Supreme Court has hinted that every child has a claim against the state to receive a basic minimum of educational services.[23] Also, if the state finds the child in circumstances that make it virtually impossible for him to take advantage of public instruction in its ordinary form (e.g. because the child cannot function in the English language) then the state may have to provide special services (e.g. bi-lingual instruction) that

enables the child to partake of the basic curriculum.[24] When the Board prescribes a course of study or promulgates guidelines for special English language training programs, it can be said to be discharging some of the state's constitutional obligations.

The Constitution can limit Board authority. If the Board were to mandate school prayers or a sectarian subject of instruction, that would violate the Establsihment Clause. Additionally, to a religious group with special sensitivities, Board-mandated instruction which in most eyes is secular and neutral can take on a religious character. To the Amish, for example, merely sending a child to an organized secular school after the completion of grammar school violates religious tenets. Consequently, it has been held that the Amish's right to free exercise of religion outweighs the state interest in compulsory education for children between the ages of fourteen and sixteen.[25] The remedy for a violation of the Establishment Clasue is to root out the partisan practice. The Free Speech Clause, on the other hand, can be vindicated by excusing the injured party from a state requirement which remains in force for others.[26] Thus, where school curriculum is concerned, the simplest accommodation of a free exercise claim is to allow the student to opt out of particular activities or subjects.[27]

Another First Amendment guarantee which limits Board discretion is the Free Speech Clause. For example, the free enterprise statute requires a course in the "benefits" of the free enterprise system, and instructs the Board to prescribe suitable materials. If the Board's syllabus required teaching as a fact that free enterprise was the "best" economic system, that might be found to be unlawful state indoctrination. This area of constitutional doctrines is not well developed, however. Our

chapter on constitutional law discusses the possible evolution of that clause insofar as it pertains to curriculum.

III. Board authority to prohibit courses: State law (see outline III)

The Board has been delegated no statutory authority

> "to affirmatively act in preventing teaching of any topic in the common schools. . . . " Att'y Gen. Op. 64-2, at 3 (1964).

However, under its power to exercise general supervision over and to regulate the public schools, the Board could,

> "act to prevent the teaching of any subject that violated the Constitution of the United States or the Constitution or laws of the State of Arizona." Id.

Consequently, the Board can prohibit partisan or sectarian instruction, because such teaching violates Arizona law. The Arizona Constitution, Article 20, Par. 7, guarantees that the public schools must be free from sectarian control. Among the school laws which the Board must enforce are A.R.S. secs. 15-203, and 15-442(A)(5). The first provides,

> "A teacher who uses sectarian or denominational books or teaches any sectarian doctrine or conducts any religious exercises in school is guilty of unprofessional conduct and his certificate shall be revoked."

The second requires that local boards,

> "[e]xclude from schools all books, publications or papers of a sectarian, partisan, or denominational character."

What is the test of partianship or sectarianism? The only Arizona precedent is Attorney General Opinion 72-2-L (1972).

> "The problem of what constitutes denominational or religious instruction is less rigorously defined than the ban against such activities.

* * *

> A book or course to be prohibited must have as its basic purpose either the establishment of religious belief or the promotion of one religious faith at the expense of others. Within this framework the subjects taught and the books used are within the sound discretion of the appropriate education agencies of the state." (at 102)

A ban on racially or sexually biased instruction is not mentioned in the statutes. Arguably, a Board power to directly prohibit such instruction is within the penumbra of the "sectarian or partisan" clauses. We think, however, that the restrictive presumption of the Arizona code precludes finding that authority. (See, however, subsection IV, below, as to the bearing of the Equal Protection Clause on the question.)

The Board can exercise its powers to mandate courses and adopt textbooks in a manner which makes it difficult if not impossible for some subjects to be taught in the common schools. This form of indirect prohibition can extend to topics that could not be reached by the Board's direct powers. For example, even though the Board could not legitimately promulgate a rule, "No sexual stereotypes in any common school lessons," it could systematically exclude from its textbook adoptions any materials containing sexual stereotypes. Also, the mandatory course of study might include an item such as this: "Social roles: recognizing sexual stereotyping."

The Attorney General has affirmed that these proscriptive powers are clearly implied by the legislature's grant of prescriptive authority.

> "[T]he Board may prescribe and enforce a course of study in the common school; prescribe subjects. . . and prescribe textbooks. . . . It is clear that within the sphere of these powers the State Board of Education in the exercise of its discretion may prevent the teaching of evolution or other topics. . . . the Board may prescribe the subjects which have no reference to evolution." [emphasis added] Att'y Gen. Op. 64-2, at 3 (1963).

This opinion was rendered prior to the U.S. Supreme Court's decision in Epperson v. Arkansas, 393 U.S. 97 (1968). The Court held that an

Arkansas statute, which made it a criminal offense to teach the theory of evolution in the public schools, violated the Establishment Clause. Epperson clearly overrules the Attorney General Opinion to the extent the latter would uphold an intentional Board policy to prevent the teaching of evolution. The scope of the Epperson rule depends on two factors. First, what makes a subject "religious," therefore activating the First Amendment religion clauses? In United States v. Seeger,[28] the Court interpreted the statutory term, "religious training and belief," broadly enough to include atheistic philosophies.[29] On the other hand, Chief Justice Burger, in Yoder, said that the state's interest in compulsory education would only be subordinated to a claim arising from adherence to a religion with a long history, and a clearly defined doctrine. Since Epperson involved an establishment of fundamentalist Christianity, it did not test the borders of the establishment concept in the curriculum area. We cannot be sure of the constitutional status of a Board policy which prevented the teaching of any economic theory other than Ayn Rand objectivism.[30]

A second question is whether Epperson can also be read as a free speech case. Justice Stewart takes that view in his concurring opinion, where he says:

> "It is one thing for a State to determine that "the subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment, and made applicable to the States by the Fourteenth." 393 U.S. at 276.

Stewart's rule would cut even deeper into the Attorney General's description of Board authority to prevent the teaching "of evolution or of other topics."

IV. Board authority to prohibit courses: Constitutional Law

(see outline IV)

We have seen in the preceding discussion that the Establishment Clause is a double edge sword. Statutes making it unlawful to teach sectarian subjects further First Amendment values. On the other hand, a Board attempt to prohibit teaching a religious or anti-religious topic where the ban would have the affect of furthering belief in a particular creed, is an unconstitutional establishment of religion.

The Equal Protection Clause prohibits unequal treatment of persons for reason of race, color or national origin. The Attorney General has applied the clause to curriculum regulation:

> "While there is no specific statutory authority in this state, it is our opinion that a course of study or textbook which intentionally promotes racial bias is prohibited. We believe that such conduct or texts would constitute a flagrant violation of the Fourteenth Amendment, and would therefore be an abuse of discretion by any agency permitting such actions." Att'y Gen. Op. 72-27-L, at 103 (1972) [emphasis added]

The focus on intention as the test of the lawfulness of the material is borrowed from the New York case, Rosenberg v. Board of Education, 92 N.Y.S. 2d 344 (1949), which the opinion quotes approvingly. Rosenberg is criticized in our chapter on New York law.

The Free Speech Clause will invalidate flagrant indoctrination in controversial areas, but the reach of the doctrine is debatable. Justice Black, concurring in Epperson on void-for-vagueness grounds, said that trying to avoid discussion of controversial subjects in schools was a legitimate motivation for state action.

> "[T]here is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools." 393 U.S. at 113.

In the majority opinion, written by Justice Fortas, there was a finding that the legislature intended to further fundamentalism; that opinion rested the holding squarely on the Establishment Clause. However, in a case without a religious dimention to it, the outcome could depend on whose interpretation of the Free Speech Clause would prevail, Black's or Stewart's.

Another source of authority for challenging a prohibition of a course is substantive due process, i.e. the personal liberty guaranteed by the Fourteenth Amendment. Meyer v. Nebraska[31] can be said to protect the "right to learn."

V. Board powers to promulgate "rules of disclosure": State law

(see outline V)

Implicit in the Board's authority to mandate some subjects and prohibit others, may be a power to regulate the way instructors approach theoretical and/or controversial topics. The Board has undertaken no major policy in this area, so our examples are hypothetical.[32]

There are two basic forms in which rules of discourse could be cast. First, the Board could promulgate abstract, procedural guidelines, such as: "When instruction touches upon controversial issues, all major points of view must be presented." The power to enforce that regulation might be derived from the Board's power to exercise general supervision over the schools.[33] However, that is a weak basis for authority. Local boards also are given managerial and supervisory authority over the schools, and the Board's attempt to substitute its judgment for that of the local officials must find an affirmative basis in law. Furthermore, the code's restrictive presumption militates against deducing so much

authority from a very general statutory provision.

The argument that authority for enforcing abstract rules is "included" in the Board's power to prescribe courses and subjects, is also unconvincing. The prescriptive powers have always been interpreted as referring to Board designation of substantive areas of study. The Board can adopt general principles of fair presentation of ideas, but to have legal force they must be tied to some exercise by the Board of its authority to prescribe content. For example, the Board has adopted a "Textbook Content Policy" which provides, in part:

> "Textbooks prescribed by the State Board of Education shall be objective in content; REFLECT A MINIMUM OF BIAS IN INTERPRETATIONS: AND SHALL NOT REFLECT ADVERSELY UPON PERSONS BECAUSE OF THEIR RACE, COLOR, CREED, NATIONAL ORIGIN, ANCESTRY, SEX OR OCCUPATION. Violence shall be treated in the context of cause of consequence ..." [Underlining emphasis added; capitalization in original] Policy Book, Rule 7(B)(10).

The Board's authority to adopt a policy of this kind in the context of exercising its duty to adopt textbooks is clearly implied from the enabling statutes. If, however, the Board purported to adopt these standards as a "Curriculum Content Policy" which it would apply to all aspects of public instruction, the action would be ultra vires.

The second way for the Board to express rules of discourse would be to prescribe subjects in conditional form. The Board can include biology in its common school course of study; it can specify coverage of the topic, the origin of man. Once it has gotten to that level of detail, can the Board go a little further? Can it require:

> "If the theory of evolution is taught, then the creationist theory must also be taught;"

The answer to this question requires a complex analysis drawing on conclusions we have reached earlier in this section. We will illustrate

the discussion with the following set of hypothetical rules:

1. If French (as a second language) is taught, then Spanish (as a second language) must be offered.

2. If Spanish is taught, then at least half of the course must be devoted to conversational practice.

3. If Central American history is taught (in a common school), at least as much time must be devoted to the culture and achievements of Indian civilizations as is given to studying the Spanish conquests and explorations.

4. If the history of Soviet Russia is taught, (in high school) representative selections from (or a summary of) Gulag Archipelago must be assigned.

5. If Marxism is taught, then Ayn Rand objectivism must be taught. (Alternative formulation: If Marxism is taught, then at least one critique of Marxism must be taught.)

6. If evolution is taught, the creationism must be taught.

7. Sex education must be offered as an elective in any common school in which twenty parents petition for the creation of such course.

The first factor distinguishing the legal status of these examples from one another, is whether the subject or topic in question is one that the local board has independent authority to offer under the provision for "other special subjects." In example #1, that is clearly the case. Under Atty. Gen. Op. 61-16(1961), a foreign language taught in a common school qualifies as a special subject. Since the local board has an independent right to offer its French course, the Board

may not burden this choice (absent clear statutory authority) by forcing the board to hire a Spanish language teacher if it wants to hire a French language teacher. If the Board thinks that the most important second language for the average Arizonan to learn is Spanish, it must find other means of establishing Spanish as a high priority optional course. Rule #1 is invalid.

Rule #2 is invalid for similar reasons. The legislature gave each board the power to offer Spanish instruction under the "special subjects" clause. If it had wanted the Board to write guidelines for the shape of that course, it would have said so, as it did in the Special Education Act, the Career Education Act, and the Bi-lingual Act. Each of those statutes created a curriculum option for the locality but also gave the Board supervisory authority through the power to issue guidelines.

Example #3 is meant to represent a situation in which Central American History is on the Board's optional common school course list. It is assumed that this subject would not qualify as a "special subject," because it has frequently been included in conventional common school curriculums. Under these assumptions, if the Board had chosen not to put the subject on the optional list, schools could not have offered it. Included in the Board's authority to decide whether to list the course is the power to include some reasonable specifications about course content. The specifications become unreasonable when they are so detailed that they no longer can be considered guidelines. (The guidelines/details distinction is discussed supra, at 70). The condition in this example impinges little enough on local discretion to be considered a guideline. Therefore, Rule #3 is valid.[34]

Example #4 is similar to #3, but two new elements make it invalid. First, it applies to high school instruction, an area where Board authority

is very limited.[35] There is no clear statutory source of authority for the rule, and because of the code's restrictive presumption, neither an attenuated argument for an implied power, nor a claim of inherent Board power, will suffice. Second, even if this rule were for the common schools (and we assumed that it was an optional course which was not otherwise a "special subject"), the mandate of a particular reading would fall in the area of detail, rather than guidelines. (The Board could, however, put Gulag Archipelago on a supplementary book list during its textbook adoptions. See infra, at 124).

The preceding examples give us the tools for analyzing Rule #5. The first question is whether the local board has independent authority to give instruction in Marxism. In a high school. the answer is yes. By our reasoning in example #4, the Board has no state law authority to tie teaching about Marxist theory to teaching about objectivism. (Of course, the legislature could enact Rule #5, as a statute. Also, if Marxism were being taught in an indoctrinatory manner, violating the Free Speech Clause, an appropriate court order could require that the school could only continue the course if certain theories critical of Marxism were also discussed.)

In a common school, to determine whether the local board had independent authority to teach about Marxism we look first to the "other special subjects" provision. Teaching about Marxism in the common schools is unusual enough to be called "special." However, Marxism must be treated differently from French, or Central American History, because it is ordinarily considered to be a threat to prevailing American institutions. The legislature which enacted A.R.S. sec. 15-1021, requiring instruction in "American institutions and ideals," probably did not

intend for Marxism to be one of the "other special subjects", along with drawing, music, domestic science, agriculture, and the like. The Board's authority to prescribe courses and subjects comes from a broader delegation than special spbjects. It probably has the power to include teaching about Marxism in a mandatory or optional course. As we said in our discussion of Rule #3, that power includes a Board prerogative to attach a condition to its authorization of the instruction, so long as the condition is neither unreasonable, nor excessively detailed. A rule that would surely pass muster would be, "If Marxism is taught, then at least one serious critique of Marxism must also be taught." The singling out of Ayn Rand objectivism is too detailed a specification to be valid.[36]

Constitutional questions aside, the evolution/creationist rule is simpler than Marxism/objectivism. "Special subjects" does not apply, because these are topics in biology, a subject that is included in most common school science courses. The Board can prescribe biology, and it can specify that the course must include teaching about evolution, creationism, or both. Therefore, its guidelines can condition teaching about one of these topics on also presenting the other one.

There is a counter to this argument. One could say that the key question is not whether the Board can prescribe a biology course and include evolution in the course guidelines, but whether the Board has the power at the same time to prescribe biology and to exclude evolution. Once biology was prescribed, wasn't it out of the Board's control to determine exactly how it would be taught? But while the Board cannot preclude the teaching of evolution if there is an independent legal right to include it in the curriculum, as long as the claimed source of

authority for teaching the subject is the Board's prescription, the Board's guideline has effect. There is no burden of showing that the Board could, if it wished, have affirmatively prohibited the teaching of evolution in the curriculum. The burden is on the school to show a source of its authority to teach the course.

Rule #7 raises a different set of legal issues, but it is presented here because it is an interesting use of the form of conditional prescription. If the rule is invalid, it must be on the ground that it is an unlawful delegation by the Board of its powers to prescribe optional courses to private persons (parents). Delegation doctrine is analyzed in our section on Arizona constitutional law.

VI. Board powers to promulgate "rules of discourse": Constitutional law (see outline VI)

The basic constitutional question is this -- If the Board cannot constitutionally prohibit all teaching about some subject X (e.g. evolution, Marxism), can it nevertheless attach a condition to the teaching of that subject, namely, "If you teach X, then you must teach Y."?

The answer first requires our making a distinction between a school in which subject X is merely mentioned from time to time, and one in which there is an extensive unit of study in X. That is, the Board's lack of authority to absolutely prohibit mention of a topic does not rob it of all of its state law authority to set priorities in the curriculum. The Board may not prohibit a teacher from responding to a child's question about evolution with a five minute summary of the theory, nor may it condition this minor, constitutionally protected

dialogue, on the teacher taking another five minutes to talk about creationism. However, if the teacher wants to give a three week unit in evolution, he must show either that the local board has independent authority to allow him to do it, or that it is part of the Board's prescribed mandatory or optional subjects. If the latter authority is relied on, then the condition is valid.[37]

The second issue is determining which subjects cannot, constitutionally, be completely excised from the curriculum. The majority opinion in Epperson says that an exclusion made for the purpose of advancing a sectarian religious doctrine cannot stand. The reach of the Free Speech Clause, however, is less defined than that of the Establishment Clause. If the rule suggested in Stewart's concurrence is followed, then it would be held that the state could not absolutely prohibit teaching about Marxism, or any other major system of thought.

Our conclusion is that the condition is generally valid in a situation where fairly extensive instruction in subject X is being given; that the condition is invalid if a) subject X is only discussed to a small exten , and b) subject X is one that the state cannot prohibit mention of in its school, under the First Amendment.

There is another way for the state to show the constitutionality of a rule of discourse. There is dictum in Epperson to the effect that Arkansas could have made it a crime to teach in the public schools that evolution is the truth. (That proposition was unnecessary for the holding as it was explained in Fortas's opinion, since Fortas found an intention to establish religion; it was not essential to the concurrences, because they were b..ed on the void for vagueness doctrine.) The Board rule, "If evolution/then creationism," can be justified as a means for

assuring that evolution will be taught as a theory, and not as the unquestioned truth. Similarly, the rule "If Marxism/then objectivism," can be said to assure that Marxism will not be taught as truth. In the latter case, however, there are two further grounds for objecting to the rule. First, there is a less restrictive alternative to requiring "then objectivism." The purpose of avoiding teaching the controversial theory as true could be fulfilled by requiring, "If Marxism/then a critique of Marxism, such as objectivism." Second, unless there is a correlative rule, "If objectivism/then a critique of objectivism, such as Marxism," the Board would be treating objectivism more favorably than Marxism. If these philosophical beliefs were equated with religious belief for the purposes of the Establishment Clause, as applied to curriculum, then this favoritism would be an unlawful establishment of the sectarian doctrine, objectivism. Alternatively, the classification might be susceptible to an Equal Protection challenge. "Equal protection for ideas" has not become part of constitutional doctrine. However, the Board's rule could be characterized as a discrimination against socialists and communists, on the grounds that the state has taken less care to protect their children from being subjected to instruction biased towards objectivism, than it has taken to protect the children of non-Marxists from instruction biased towards Marxism.

D. State Textbook Selection

Introduction

The most tangible exercise of Board control over instruction is its designation of the books and teaching materials that will be used in Arizona's common school classrooms. While the general locus of decision-making authority regarding textbooks is much more state-centered in Arizona than in most other states, one would be mistaken to conceive of Arizona textbook selection as a relatively straightforward enterprise bounded by clear-cut rules. Rather, it is a process in which formal statutory and decisional law play roles of widely varying importance from year to year.

To determine the scope of the Board's power, one must consider two phases in the adoption process. First, there are the events leading up to voting by the Board on proposed textbook lists. Because the legislature has given the Board the power and duty to prescribe textbooks but has been virtually silent about the appropriate standards and procedures for selection, the Board enjoys broad discretion. Consequently, the primary way for interested persons to affect the outcome is not by suing the Board, but by trying to control its membership, or to persuade it to make decisions favorable to one's point of view. Members are appointed by the Governor; adoptions are made only once in five years for each subject. The two foci of open public participation are, then, the gubernatorial election, and the hearings (required by Board rules) prior to voting on adoptions.

Few gubernatorial campaigns are made or broken on an issue like science textbooks. The pointed curriculum debates occur during adoption periods. During the early 1970's, the proceedings of several

curriculum commissions (Basic Goals Committees) -- appointed by the Board to recommend to it standards for textbook adoptions -- was front page news.[36] Many educators, local school officials, and parents were displeased and threatened by the actions taken by the commissions. At crowded hearings, they challenged the commissions' recommendations. They formed organizations to press their cause. We have summarized these events below, under the heading, The Politics of Textbook Selection. Our conclusion is that the centralization of control over textbooks generated a large amount of wasted energy and ill-will. The curriculum controversies were not constructive dialogue, but an all-out battle between groups trying to capture the prize of the adoption.

In addition to the discussion of the politics of textbook selection, our coverage of "phase 1" includes an analysis of the legal standards for choosing textbooks. The legislature has said little directly on this subject, so the analysis is mostly based on inferences from related statutes. We also explore the economic purposes that partly underlie the textbook statutes. To the extent that it can be shown that centralized textbook selection was originally conceived by the legislature as a means to drive down textbook prices and win editorial concessions from publishers, one can argue that the machinery cannot properly be used to force local school instruction to operate within a very narrow band of values, political theories, and pedagogical methods.

The second phase is <u>enforcement</u>. Here, a fundamental problem is knowing the legal effect of the lists of state-adopted books. If a principal finds teaching materials which he would like to purchase for use in his school, he can't take action until he has worked through a

set of questions, many of which lead into legal snarls. His threshold inquiries are:

1. Do I (or the district board) have authority to purchase the materials?
2. Will the board of trustees be especially reluctant to approve this purchase order because these materials belong in a budget category which is subject to a statutory limitation?
3. Even if I have the authority to obtain the materials, will I then have the authority to require (or permit) that they be used in the classrooms with as much emphasis as I would like?

Answering question #1 requires categorizing the materials in terms of two statutory frameworks -- the laws that empower the Board to prescribe courses and subjects, and the textbook adoption laws. Because these two sets of statutes have neither a common plan nor a uniform terminology, this task may involve a lot of guesswork. Some of the important questions will be:

Are the materials textbooks or teaching aids?

Which state list(s), if any, do they appear on?

For teaching what subject will they be used -- is the subject Board-mandated? Board-optional? independently authorized by local board?

The legal materials that must be worked through in this analysis are discussed under the heading, Categories.

Question #2 draws us into problems of local school finance. There is a single form of budgeting which the legislature has imposed

on all districts. It makes a curcial distinction between Maintenance and Operation (M & O) expenses, on the one hand, and Capital Outlays (CO) on the other. When the board of trustees appropriates funds for CO, that decision does not have to be submitted to a vote of the district electors;[37] when funds are designated for M & O, that decision is final only if the amount budgeted in that category does not exceed the previous year's M & O by more than 7%.[38] If the increase exceeds the 7% limitation, the appropriation is only binding if approved by the electorate.[39] Naturally, the board will make strong efforts to stay within the per cent increase limitation, so its own decision will be final. Depending on the circumstances, teaching materials may be classified in the budget under M & O, or under CO. Our principal will have a better chance of having his order approved if it will be budgeted as a Capital Outlay. The confusing intricacies of this classification are discussed under the heading, Categories.

Question #3 introduces the "supplantation" problem. The appearance of a textbook or teaching aid on a Board list not only determines whether it can be used at all, but also how much it can be used. For example, a supplementary book cannot be relied on so heavily that it supplants the prescribed main textbook. The application of this rule is discussed under the heading, Compliance: Rule Against Supplantation.

A more traditional aspect of the enforcement phase is finding and correcting violations of the Board adoptions. So far, we have only considered the problem of knowing whether a particular purchase and use of a textbook is legal. What if our principal obtains the materials because of a mistaken conclusion about their status, or out of disregard for the question of the lawfulness of his action? The

Board and the Department have not had the resources to closely monitor the actions of local districts. Unless violations were brought to their attention (which is what happened with Man: A Course of Study (MACOS) see case study, infra, at 248) state officials rarely extended their scrutiny beyond looking at budget reports and purchase orders. In the latter case, deviations from Board mandates could be disguised in sheaves of papers. The protective camouflage was that much harder to pierce because of the confusing legal terminology already mentioned. In the early seventies, the state agencies tried to tighten up what control measures were available to them. The Board required that district officials sign affidavits certifying that their schools were in compliance with the textbook laws. Superintendent Shofstall, meanwhile, established a procedure for substantive review of district purchase orders (to replace the usual practice of rubber-stamping). These new policies are described in more detail under the heading, Compliance: Rule Against Supplantation.

PHASE I: Pre-adoption

1. The (unclear) legal standards guiding the Board's exercise of its adoption powers.

a.) Economic purposes behind centralized textbook selection.

An important and ideologically neutral purpose for centralizing selection and purchasing of textbooks, is to create a disciplined buyer cooperative able to exert market power against publishers. Of course, building up market power was not the only reason behind enacting the textbook selection laws. The legislature also wanted to establish a minimum level of state-wide uniformity in curriculum. To

this end, it gave the Board's judgements about instructional policy an important role. The extent of that role, however, should not be exaggerated. Understanding the economic rationale of the adoption statutes helps one to determine when a Board textbook policy has gone beyond the discretion intended by the legislature.

The adoption of a textbook is an almost certain guarantee of high volume orders for the text's publisher. From the earliest phases of planning a new text, the editors will try to foresee the characteristics which will please the Arizona Board and thereby lead to capturing a large chunk of that state's market. A single school district would be in no position to pressure a publisher to change his materials, but the State Board, backed by a system of textbook adoption, can sometimes elicit from the industry the kinds of books it wants. This phenomenon is more pronounced in a large centralized state like Texas. Publishers frequently put out special Texas editions in order to satisfy state curriculum guidelines and to therefore have a crack at capturing that market.

When Arizona became the first state to require a course in the benefits of the Free Enterprise system, the Board was concerned that it would be some time (if ever) before three satisfactory textbooks -- the statutory minimum for adoption — would be on the market. The Attorney General was asked whether a smaller number could lawfully be adopted for the new subject. He answered that if fewer than three bids were made, then fewer than three textbooks could be adopted. Meanwhile, the board and department undertook an unusually active role in developing materials. Now that Texas and Florida have adopted Free Enterprise laws, one can expect more commercial texts in the field.

Centralized textbook selection may also help to drive down prices, at least in centralized states as compared to decentralized ones. The common school boards of trustees make their selections from the mandatory and supplementary lists, and send their orders to the state board. The board then negotiates with the publishers and contracts for purchase. The agreement must guarantee that the price of the books will be no greater than that paid by any other buyer, and that in the event of a subsequent decrease in another buyer's price, reducing it below the Arizona price, that decrease will be passed on to Arizona. It would be more difficult for local districts negotiating separately to purchase, say, twenty or thirty different editions of fifth grade history texts from a dozen publishers to secure agreement by the publisher to such stringent price terms, than it is for the Board in its position of negotiating large orders for at most five such texts.

There are two important differences between textbook finance in the common school districts as opposed to the high school districts. To begin with, A.R.S. sec. 15-1101 imposes on common school trustees the duty to furnish books in required courses free of charge. High school trustees may impose reasonable rental fees, and in some situations may be <u>required</u> to charge a fee. Att'y Gen. Op. 56-1(1956). The original legal theory was that the state owned the textbooks used in the common schools, and the districts held them in trust. But that formulation merely served to harass local trustees since they had to pause before they could undertake such simple actions as trading in worn and virtually useless books. See Att'y Gen. Op. 62-3-L(1962). The legislature amended the law, making all books that have been and will be purchased through the Board the property of the district. Sec. 15-1107.

The second difference is more symbolic than real. Because almost all common school instruction is subject to mandatory textbook regulation, its purchasing of books is done almost exclusively through the Board, whereas the high school districts only order mandated books in that manner. Even though basic state aid distributions go directly into both common and high school district treasuries without any earmarking of use for textbook purchasing, the dependence of common districts on the Board's purchasing activities, the issuance of free textbooks in the common schools, and the old concept of state held title to the books have fostered the notion that the state government supplies and pays for books in the common schools but not in the high schools. As a corollary, it is felt that there is some rough justice in the state retaining more content control over materials it pays for, as compared to those purchased from local funds.

Senate Bill 1079 (1974), introduced by Senator Ulm, exemplifies this brooding theory. Sec. 15-102 would be amended to read:

> "The state board of education shall:
>
> 18. Prescribe textbooks AND ANY RELATED SUBJECT MATTER MATERIALS for the common AND HIGH schools. . ."
> (additions to previous law in capital letters)

The changes represent a two-fold intensification of state control. Powers of prescription are extended beyond mere "textbooks," thereby ratifying the state board's flexible definition of that term, and the board is given new power to prescribe materials for use in required high school courses. The bill later refers to high school courses,

> "REQUIRED BY LAW OR BY RULE OR REGULATION OF THE STATE BOARD OF EDUCATION. . ." page 3, lines 30-31.

This is somewhat puzzling since there is no antecedent statutory authority for the Board to mandate high school courses by rule or

regulation. Anyway, the feature of the proposal that most concerns us here is the provision that,

> "PAYMENT FOR SUCH TEXTBOOKS AND RELATED MATERIALS SHALL BE MADE BY THE SUPERINTENDENT FROM FUNDS MADE AVAILABLE FOR SUCH PURPOSE BY LEGISLATIVE APPROPRIATION."
> page 3, lines 33-35.

This is unprecedented. The high school district, unlike the common school district, would not have to pay for the books out of its general budget, nor would its share of basic state aid be reduced by the cost of the state purchases. The quid pro quo is purchase of books from special state funds in return for greater control by the Board over the content of high school education.

A current statutory provision that balances state control with local fiscal interests is the last sentence of sec. 15-102, par. 18:

> Textbooks selected pursuant to the provisions of this title shall not be changed during the next five years.

This is an old rule which is universally understood to be intended to protect the districts against having investments in textbook inventories rendered valueless by unexpected changes in state lists. When, after five years, a new list is adopted, the district must purchase a text for each student from that list; the district cannot continue using a book that only appeared on the old list, except as supplementary material. Att'y Gen. Op. 69-8-L (1969).

These economic factors add a new dimension to the meaning of the textbook selection statutes. The law empowering the state to adopt three to five texts for each required subject can be seen as a compromise between the economic efficiency of organized high volume purchasing, and the interests of districts in making book choices appropriate to perceived local needs and tastes. Undoubtedly, the

legislature also wanted to promote some degree of uniformity in the content of instruction throughout Arizona, but it probably did not contemplate a situation in which the Board would adopt a list of five almost identical texts for a diverse subject, or for an area in which there is intense professional disagreement about appropriate methods of instruction.

A court test of this proposition may have been narrowly averted in 1974-75. The old Board[40] had appointed a language arts commission which was dominated by a "phonics only" faction. Unlike some of the other commissions, e.g. Science, this one refused to moderate its position despite vigorous criticism of its statements. It recommended a language arts adoption including only reading textbooks utilizing a traditional phonics approach. The new Board, however, rejected the phonics-only recommendation (favored by the old Board) in January 1975. It approved an adoption that included both phonics texts and books using other methods.

b.) Other standards

According to the Attorney General, the agency charged by the legislature with the duty of selecting books in any single context can only be reversed for "gross abuse of that duty."[41] Whether the choice is vested in the Board, or in local officials, is decided by the laws examined in our discussion, Categories, in Phase II. In this section, we are assuming that the Board has authority to select books, and we are trying to find legal standards that limit its discretionary powers.

Explicit limits are hard to find. As the above-quoted section indicates, the Attorney General has recently interpreted A.R.S. sec.

15-102(18) so as to give the Board a carte blanche for selecting textbooks.

> The choice of textbooks is . . . within the sole discretion of the State Board. State v. Hendrix, 56 Ariz. 342, 107 P. 2d 1078 (1940).
>
> The Board is limited only by specific prohibition or flagrant abuse of discretion. [emphasis added] Att'y Gen. Op. 72-27-L, at 102 (1972).

Nevertheless, paragraph 18 itself gives a foothold for finding an implied limitation on Board actions. While the Board is empowered to adopt mandatory textbook lists for certain subjects, the lists must include a minimum of three choices. This suggests that the Board may not impose total uniformity on the curriculum, a principle that would be violated if the list consisted of three, four, or five almost identical textbooks.

A second basis for limiting Board discretion can be implied from the essential role of local districts in the legislative scheme of curriculum development. In our discussion of the limits on Board powers to mandate subjects, we made several arguments which would negate Board authority to exercise its adoption powers in a manner that prevented district actors from filling in the details of instruction and from having minimal choices among teaching methods. See, Control of Subject Matter, Board Authority to Mandate Courses, supra, at 73, 77.

There is one explicit legal limitation on textbook content, but it is of narrow scope. Article 11, Sec. 7 of the Arizona Constitution prohibits the choice of textbooks which advance a specific religious belief. In addition, the Legislature has imposed on school districts the duty to exclude from schools and school libraries,

> all books, publications and papers of a sectarian, partisan or denominational character. Sec. 15-442, par. 5, Sec. 15-450 B, par. 2.

To give effect to these provisions, the statutory grant of the general powers of the State Board over curriculum cannot include authority to impose on districts any materials having the above-mentioned characteristics. Applying these criteria, however, is another problem. There are no cases in point. The Attorney General has endorsed the test used in Rosenberg v. Board of Education, 92 N.Y.S. 2d 344 (1949), which requires a showing that the materials in question were intentionally selected in order to promote racial bias. Att'y Gen. Op. 72-27-L (1972). The Rosenberg test is criticized in our chapter on New York law.

A more tenuous approach for squeezing standards out of statutes is to pick up on the values emphasized in various places in the Education Code. For example, the Board cites the following provision in the "Legal Basis" for its textbook policy:

> "Continued open defiance of authority or habitual profanity and vulgarity, constitute good causes for expulsion. Sec. 15-305 B." A.C.R.R. R7-2-301, p. 90.

These provisions are slim reeds on which to base challenges to state or local board actions. More plausible bases for limiting discretionary power are to be found in:

1. Arizona constitutional law regulating delegations of legislative power. See supra, at 7 .
2. The Bill of Rights of the United States Constitution, especially insofar as it prohibits instruction in the nature of indoctrination.
3. Self-limitation in the form of:
   (a) Adherence to internal regulatory procedures.
   (b) The Board's customary (before 1970) deference to local school decisions.
   (c) Deference to perceived "professional" standards.

Curriculum Committees of State Board*

1) State Textbook Committee (Advisory)

A. Functions:

This committee has a general watchdog function; it does not participate in the regular adoption procedure:
It designs and evaluates adoption procedures.
It studies legislative changes in textbook adoption procedures.
It accepts requests for special evaluations, and copes with unusual problems arising apart from the regularly scheduled adoptions. An example given in the regulations is that it evaluates requests to substitute revised texts for the older editions. Presumably, if a board asked to substitute a non-listed textbook for a basic text, under the application procedure newly enacted in amended A.R.S. sec. 15-102(18), this committee would process the application, evaluate the application and make a recommendation to the Board.
It acts as an appeal board for cases in which the Department has found that a textbook purchase order would supplant a basic text.

B. Establishment: Each Board member appoints one committee member to serve at his pleasure. A committee member must be an "experienced educator." (Total: nine members)

2) Basic Goals - Course of Study Committees (Advisory)

A. Function:

Whenever the Board wants to revise the "Course of Study" (the minimum syllabus) for a prescribed subject area, it convenes one of these advisory committees to work up a document for submission to the Board. At any point in time there may be in existence several committees, or none, depending on how much revision the Board wants done.

The work of these committees is a basic component in the textbook selection process, because their reports, to the extent they are adopted as courses of study, become the "educational content criteria for the selection of textbooks."

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*Included are the three committees most directly related to curriculum content, those which make recommendations on subjects and textbooks. These are non-statutory committees, i.e., they are constituted by the Board and governed by its regulations. See A.C.R.R. R7-2-201.

Basic Goals - Course of Study Committees (cont.)

B. Establishment:

27 members: 9 educators, 18 lay members.

Each Board member nominates 2 lay members and 1 educator member, and the whole Board approves the nominations.

3) State Textbook Evaluation Committee (Advisory)

A. Function:

Regular adoptions occur in five year cycles for each subject.
Each year, a committee is convened to evaluate the available materials for the subjects due for adoptions in that year. It recommends 3-5 basic textbooks for each subject, and also recommends a list of supplementary books.

B. Establishment:

27 members. 9 educators chosen from these categories:

Principal--elementary
Content Specialist—university based (in content being considered)
Curriculum Specialist--elementary based (in content being considered)
Teachers from k-3; 4-6; 7-8; 9-12
18 lay members.

Geographically balanced representation is required.

Each Board member nominates one educator and two lay members, but all the nominations are considered together as a slate to be approved by the Board only after it is determined that all of the distribution requirements are met.

2. The Politics of Textbook Selection (See outline of curriculum committee functions).

The more discretion delegated to a particular office, the more important it is who holds the office, and how he can be influenced. As we have seen, the legislature's delegation to the Board of textbook selection authority appears to grant broad discretionary powers. Until the early 1970's, Arizona state officials had not pressed this authority to its limits. However, the appointment by Governor Williams of conservative members in the late 1960's, and the ascension to power of Superintendent Shofstall, created a working majority of activist-minded state officials with coinciding educational and social-political philosophies. (As time passed, Shofstall opposed the position of the most conservative Board faction on an increasing number of issues.) For example, several members were opposed to all federal education grants, on principle. (Previously, these had been routinely approved by the Board.) In 1972, they created a furor by rejecting a grant to the Mesa School District to fund an artist in residence.[42] A revealing display of both the politics of the conservative faction, and its appetite for supervising all facets of education in the state, occurred at a Board session at which members directed the Department to "de-emphasize" a peace sign that appeared in a Department exhibit at a state fair. (It was merely part of a modernistic design including religious symbols, the signs for male and female, and the two-finger victory sign.)[43]

The decisions of the Board and Superintendent since January 1975, indicate that the intense curriculum battles of the 1970's are over.

Those disputes are beginning to fit together as a discrete episode, a period in which a coherent group tried to exert the curriculum powers of the Board to the fullest extent. In the previous section (and at various places throughout this chapter) we noted the legal limits of the power to select textbooks. In this section we examine the political limitations on Board authority that manifested themselves in the curriculum disputes of the 1970's. We find that a severe disadvantage of a centralized textbook selection procedure is that it can generate unproductive controversy by encouraging groups to "capture" the levers of control and to impose their educational and political beliefs on all of Arizona.

* * *

It is hard to quarrel with centralized textbook selection if it pulls a state's low-achieving schools up to a minimum standard of instructional quality, or if it pushes the best teaching in the state past new frontiers by sponsoring working committees of high-powered thinkers whose recommendations are heeded by publishers wanting to capture a part of the state textbook market. Once the Board accepts a set of guidelines, publishers will produce materials which follow them in order to be able to submit strong bids at adoption time.

But this promising scenario assumes agreement and on what is good instruction and on where the frontiers of learning are located. Establishing criteria frequently requires choices among controversial values. Should Arizona public high schools teach <u>all</u> of their students about the use of contraceptives? Should history be taught as a set of "basic facts," or as a body of theories? What is the basis for an assertion that the free enterprise system is the most "successful"

economic system known to man? Or that "U.S. remains the envy of the civilized world and the last best hope of mankind?"[44]

Is it better to have questions like these thrashed out at the state level and the answers imposed on every public school child in Arizona, or to have them resolved independently by district-wide forums, by small meetings of faculty and parents, or even by classroom discussions among students and teachers? If the United States is a rapidly changing society in which many important values are in transition, then good faith discussions among persons with varying interests and values is a positive good. Anyone accepting this premise will want to know -- before deciding whether centralized textbook selection is a net gain or net loss -- whether the political process by which decisions are made approximates one of the following models.

A. Consensus Model.

It is assumed that all constituencies of any size are represented in the decision-making body. Every element of a course of study or adopted textbook is acceptable to every committee member.

Variant 1. The consensus is achieved after a period of dialogue during which many of the decision-makers alter their original positions. Many citizens might oppose the consensus product, but that controversy may burn itself out as the process of persuasion that occurred in the committee repeats itself in the larger community. Public school instruction is, of course, a part of the process.

[1] In this variant, the textbook selection machinery operates as a forum which promotes the sharing of

values without resort to manipulations of political power or to other forms of domination.

[2] However, when the committee's selections are made binding on all public schools in the state, is that leadership or indoctrination?

Variant 2. There is little or no dialogue; the committee avoids controversial issues. It prescribes instruction which represents the lowest common denominators of the opinions of the community. The resulting curriculums would need not be ideological, but they will probably be excruciatingly dull, and they will exert a conservatizing influence because of the exclusion of controversial subjects.

B. Bargaining, or Propositional Representation Model.

It is assumed that all constituencies of any size are represented in the decision-making body. The curriculum guidelines and textbook adoptions include concepts and materials of a varied and sometimes conflicting nature. Consequently, local decision-makers enjoy considerable leeway in shaping the content of instruction without violating state law or policy. What makes this variety possible is that many members have assented to the inclusion of provisions which they do not like in return for a like toleration of their own ideas by other members. This is what primarily distinguishes the bargaining from the consensus model -- almost every member is opposed to some element of the recommended curriculum. When this process prevails one would expect that centralized textbook control would not greatly change

classroom instruction from what it would be like under local autonomy.

C. Winner-Take-All Model.

It is not assumed that all constituencies of any size are represented in the decision-making body. Politically organized factions try to obtain a working majority on a given committee for the purpose of adopting a curriculum conforming exactly to their own philisophy and educational theories. Centralized curriculum control is seen as an instrument for propagation of one's values. There are no concessions to minority views, no boda fide attempts to achieve dialogue. Avoiding controversy in the operation of the committee is not seen as an independent goal, though it may at some times be of practical importance.

Persons playing this power game have no qualms about using the force of law to enforce their idea of instruction on the entire public school system. In fact, they may be motivated by a belief that such action is necessary to counteract another group's disproportionate control of public instruction. (One may want to test the theory that centralization of selection favors the development of a winner-take-all process because it raises the stakes for winner and loser. This is an incentive for concentrated political effort.)

Before approximately 1968 the politics of state textbook selection in Arizona apparently varied between Variant 2 of Model A, and Model B. From 1968-1974 there seems to have been a transition to the third model. The state board began to construct a legal and institutional framework for developing detailed curriculum guidelines that

would become mandatory syllabi in addition to being criteria for textbook selection. Several advisory commissions were created to examine particular courses of study. There were severe, unresolved internal battles, and when some of the commissions began to release their preliminary guidelines and hold public hearings, they were met with expressions of outrage.

Notwithstanding state board regulations governing the membership and conduct of the commissions, it was not clear what their job was supposed to be.[45] Conflicting public statements by commission members, public officials, and interest groups, plus various cosmetic changes (like twice renaming the social studies commission) added diversity to the confusion. The main issues were how detailed the commission guidelines were to be and what legal force they were to be given by Board adoption. The controlling faction in the social studies commission set to writing a report that amounted to a program of lesson plans, and this group expected those plans to be legally binding on classroom teachers. A mass resignation of members did not sway the controlling group. There could be no purer example of winner-take-all politics than Board acceptance of the rump commission's report.

The most dramatic event in the social studies commission furor was the 28 October 1972 resignation of eight commission members. Subsequent public discussion revealed many ways in which persons thought that the commission's deliberations potentially affected their interests. Among the issues raised were these:

a) local autonomy v. state control

b) "basic education" approach v. "behavioral" approach

c) factual approach v. problem solving approach

d) indoctrinatory v. politically neutral curriculum

e) Tucson v. Phoenix

f) right wing ideologues v. moderates, liberals, and professional educators

g) obligations of a committee member, i.e., abiding by a majority of commission v. appealing to the public through the press.

Three useful documents are the 30 October 1972 Statement of George Archibald, Chairman of the Basic Goals Commission; the "white paper" of the Arizona Coalition on Educational Policy; and the 30 October 1972 quasi-public letter of Robert W. Klingenfus, Coordinator of Social Studies for the Tucson Public Schools. The depth of the schism within the commission was reflected in the inability of post-resignation commentators to agree on what was at stake. Some illustrations follow:

Coalition:

> Historically, local districts have been provided general curricular goals and have been allowed flexibility to meet local demands by adjusting curricular schedules and by varying the emphasis placed upon the specifics of courses taught. p. 2.

> Since 1969, the State Department of Education has embarked upon a power grab which is destroying the natural balance of educational control in Arizona. p. 1.

Archibald:

> Obviously the real issue is not centralization of schools or infringement of local control of public education. Arizona law requires the State Board of Education to do what it has asked this Commission to accomplish....
>
> The issue is not control of the 27-member Commission by any faction concentrated in Phoenix...
>
> What controversy has obtained during Commission meetings has centered on the traditional philosophical dichotomy between those who believe in the behavioral or attitudinal approach to social studies instruction...and those who believe in a more fundamental approach... p. 2.

Klingenfus:

> [I]n too many cases a very small group is determining

what shall be taught in the K-12 program. p. 1.

> If the commissions are given the power to construct detailed courses of study then there is no role for teachers or the State Department except as technicians...
>
> I believe...that Mr. Archibald has misinterpreted the intent of the definition of a course of study. [original emphasis] p. 2.
>
> If social studies cannot be taught in the schools at any level and only the separate disciplines of geography, government, history and economics can be taught then I am afraid that the clock has been set back 50 years. p. 3.

Political pressure caused some commissions to become more general and more eclectic in their reports. Also, Superintendent Shofstall and some Board members increasingly talked about claiming only recommendatory authority for accepted commission reports. A document which exemplifies these trends is the final report of the Basic Goals Commission for Science.[46] It is subtitled, "Course of Study/Criteria for Textbook Selection," and the preamble states,

> The principal function of the Basic Goals Commission of Science is the development of a course of study to provide the criteria for textbook selection...No attempt has been made to prescribe any specific approach to the teaching of science..." p. 1.

The text fulfills this promise. Curriculum for grades K-8 are outlined in 20 pages. Large crowds of people had lambasted the science, health, and history commissions when they presented much longer and more detailed preliminary reports in the first few months of 1973.[47] Finally, dropping an earlier idea of requiring equal time for teaching the creationist theory of life, the commission rejected the use of the guidelines as a means to advance any particular scientific or anti-scientific theories:

> The students should have access to the various scientific interpretations of even the most controversial theories of science, i.e., those dealing with the origin and adaption of terrestrial life forms, the origin of celestial systems and their sub-systems, the existence of extraterrestrial life, and the absolute nature of matter and energy. p. 18.

So the next step was for publishers to submit bids on materials that they think satisfy the guidelines, and from which the Textbook Evaluation Committee would recommend three to five textbooks from among the bids.

The early 1970's has shown that controlling factions within textbook advisory commissions can have their gains neutralized by pressures based outside the commissions and the board. During 1972-1974, opposition to various actions of the curriculum commissions included:

1. Legislation introduced that would strip Board of powers to prescribe courses of study and textbooks.[48]

2. Superintendent Shofstall's shift to a position in support of local control of curriculum.[49]

3. "Parents' Bill of Rights" movement.[50] (conservative group, favored some commission actions, opposed others.)

4. Arizona Coalition on Educational Policy.[51] (author of "white paper").

5. "Bill of Rights" for local control submitted by Arizona School Administrators, Inc.; similar policy urged by Arizona School Boards Assoc.[52]

6. Annual Conference of Arizona PTA's calling for "return to local control of schools and a limitation placed on the powers and duties of the Arizona Board of Education."[53]

7. Tucson District #1 voting support for a teachers' resolution calling for disbandment of all state curriculum commissions.[54]

8. Concerned Citizens for Local Control threatening lawsuits.[55]

There is no evidence of significant countervailing pressure. State Senator Ulm introduced a bill that would have strengthened Board control over curriculum,[56] but he soon withdrew it. The conservative Arizona Breakfast Club disputed the argument that the actions of the curriculum commissions were a threat to local control, and defended having 1/3 lay representation on the commissions.[57] (The Arizona PTA convention, on the other hand, resolved that more scholars should be on the commissions.)[58] A review of the files of the Phoenix Gazette and the Arizona Republic (jointly owned newspapers of very conservative bent, one of whose editors was George Archiblad, chairman of the social studies commission) reveals little else worth mentioning.

By the summer of 1974, it was apparent that none of the first four commissions, and no majority faction of any commission, was going to be able to make decisions that would dictate the intimate details of instruction for a five year period (there are five year intervals between textbook adoptions). The changed positions of commission have already been discussed. Health education had been controversial since August 1969, when it was made a required course, but in March 1973 the Board issued a policy clarification stating that sex education was not required as a part of the health course, and that eliminated most contention over the health commission. The same month it became apparent that the history commission had moved towards a consensus position. It cut its report from 31 to 10 pages, and it discarded language calling on teachers to "stress the positive rather than negative aspects of the past," and to "emphasize continuity more than conflict" in the nation's past. The social studies commission had the ground cut out from under

it when, on Shofstall's urging, the board voted (in November 1973) that its guidelines were not "minimum requirements which must be taught," but suggested requirements which "should be taught."[59] Consequently, the December hearings on the fifty-five page social studies guidelines were quiet.

This is not to say that during the period of public backlash the state board reconsidered its general goal of asserting greater control over local schooling. As described elsewhere in the chapter, when Superintendent Shofstall took steps to implement procedures guarding against supplantation of mandated textbooks, the Board and the Department trie to establish performance-based teacher certification, and the legislature and Board focussed on the use of standardized tests to define minimum student performance levels. However, the ultra-conservative agenda for state-wide curriculum control suffered two severe set-backs early in 1975. It appears that the newly constituted Board[60] is moving away from active and detailed intervention in instructional practices in the districts. First, the Board had established a moral guidelines committee in the summer of 1974, whose job it was to consider adopting standards for moral education patterned on the California model. The Board abolished the committee in February, 1975, at the request of its chairperson, Merle Platt, who said,

> "I have concluded that the teaching of values has no place in a compulsory, secular school system."[61]

The other Board turn-around was its rejection of the phonics-only approach to teaching reading which was recommended to it by the language arts commission.[62] The Board endorsed district use of various approaches to teaching reading, and said that the state textbook adoption in language arts would make available materials for more than one reading method.

PHASE II: Post-adoption

1. Categories

The impact of the state adoptions on local curriculum planning depends on the classification of materials with respect to these sets of categories:

a) Courses (What kind of course would the materials be used in?)[63]

b) Textbooks (Is the choice pre-empted by a state adoption?)

c) Budget (How will the purchase be classified in the local budget?)

To take a clear-cut case, consider a principal ordering a textbook for fifth grade mathematics. His intention is to use it for the basic coursebook. Because a prescribed, mandatory, common school subject is involved, there is a state adoption of 3-5 basic textbooks. The principal must choose from this list. Whatever his choice, the terms of his district's contract of purchase will already have been determined by negotiations between the Department and the publisher. The purchase order must be approved by the Department, but the actual order, sale, payment, and receipt of materials is handled by local officials. The expense is tabulated in the budget under "Capital Outlay--Textbooks," where it has no effect on the per cent budget limitation.

Few cases are so simple. Quite aside from the intrinsic conceptual difficulties of coordinating the functions of the three categories, problems are created by the lack of uniformity in language among the students, and in the Board regulations implementing them. It often seems that each of these provisions was drafted with reckless disregard for the need to apply it in conjunction with the others.

Some examples of interpretive problems are these:[64]

1. Purchase order for set of math games for fifth grade math course, with intention of using it to occupy 5-20% of student work time. Not on basic or supplementary textbook list. Can it be purchased? What budget category?

2. Purchase order for math book to be used by average fifth grade student for 30% of his assignments. Intention to give discretion to teachers to allow pupils making particularly good progress in that book, as compared to basic text, to use it for up to 100% of their work. Can the book be used as intended?

3. Purchase order for illustrative charts to be used in conjunction with basic text (in fifth grade math course) but not issued by same publisher; they are equally suited for use with non-listed books. What budget category?

4. Purchase order for booklets for journalism, an optional subject by Board regulation; the Board has issued no book list. May booklets be purchased? What budget category?

5. Purchase of textbook for common school course in anthropology. Not on Board optional subject list; no relevant textbook adoption. Is it a "special subject"? If yes, is local discretion absolute? Budget category?

Neither the legislature, nor the courts, nor the state agencies has given us a consistent set of interpretations harmonizing courses and subjects; textbooks; and budgets. In this section, we try to present the relevant laws in as clear a form as possible, and we discuss how they have been or might be applied to situations such as those in the above examples. Figures 1-A and 1 chart the relationship

FIGURE 1-A (Explanation of terminology in Figure 1)

TEXTBOOK ADOPTIONS

(a) basic textbook lists (3-5 texts per subject per grade level) A.R.S. sec. 15-102(18) sec. 15-442(A)(2)

(b) supplementary book lists (Individual purchases must be approved* by Board) A.R.S. sec. 15-1101 sec. 15-442(A)(A)

(c) ad hoc Board approval* of substitutions for prescribed basic textbooks A.R.S. sec. 15-102(18), (as amended, 1974)

(d) ad hoc Board approval* of purchases of supplementary books not appearing on approved lists. (Asking for Board approval is the administrative practice. Board authority to require such clearance is implied from sec. 15-1101 -- power to approve purchases of listed supplementary books).

SUBJECTS OF INSTRUCTION

(i) mandated subjects (Mandated by legislature, or by Board pursuant to A.R.S. sec. 15-102(15-16))

(ii) optional subjects (Duty of Board to promulgate list, under A.R.S. sec. 15-102(17))

(iii) "special subjects" (Independent authority of districts to offer them under A.R.S. sec. 15-448(A)(3). Several are named in the provision, but also district may add on "other special subjects". In other words, these optional subjects that legislature has specifically named, or has given districts independent authority to present.)

(iv) optional high school subjects (Prescribed by district with Board approval A.R.S. sec. 15-545(B). State Board has no authority to prescribe high school subjects).

*Statutory standard for approval in (b) and (d) is that supplementary books cannot "supplant" prescribed basic text. A.R.S. sec. 15-102(18). In (c), however, the very purpose of the ad hoc approval procedure appears to be to change the basic text.

FIGURE 1: Relationships Between Textbook Adoption Categories and Subjects of Instruction Categories

Textbook Category	Subject of Instruction	Relationship (from local board perspective)
Prescribed Basic Text	Mandated Subject	(A) Common schools: duty to select from Board list and purchase in legally sufficient quantities. Unlawful to employ other materials in a manner that supplants the basic text. High schools: Some statutes mandating subjects give Board power and duty to prescribe materials, e.g., Free Enterprise (A.R.S. sec. 15-1025(A)), Civics, Arizona History (sec. 15-1021).
	Optional Subject	(B) Board does not adopt basic list for optional subjects. (Similar form of control can be exerted through Board exercise of power to approve purchases of books from supplementary lists.)
	Special Subject	(C) No adoptions. (Independent local authority.)
	Optional High School Subject	(D) No adoptions. (Independent local authority.)
Supplementary Textbooks	Mandated Subject	(E) Board does issue lists for most of these subjects. Local purchases from list must be approved by Board. Purchase in such quantities as to supplant basic textbook not permitted. If there is no list, practice is for district to ask for approval anyway. This is probably legally required, since approval would have been required if there had been a list. Contra: legislature told Board to issue supplementary book lists in order to give local boards some warning about how Board will respond to purchase order. Absence of list invites arbitrary behavior by Board. Therefore, if Board has not issued a list, its power of <u>approval</u> has been forfeited.

FIGURE 1 (cont.)

Textbook Category	Subject of Instruction	Relationship (from local board perspective)
Supplementary Textbooks (cont.)	Mandated Subject (cont.)	(F) Lists rarely issued. Practice is for local officials to secure Board approval of individual purchases anyway. However, this practice may not be legally required. Argument #1: same as "contra" in preceding box. Argument #2: A.R.S. sec. 15-1101(B) only applies to prescribed subjects.
	Special Subject	(G) No adoption. It would not make sense for the Board to issue a book list for a subject which it has not recognized as either a mandatory or optional subject. Thus, so long as subject is a special subject, no state control of materials. Board can change that situation by naming the previously special subject as a mandatory subject, and prescribing materials. Query: Can Board take over control of special subject by naming it an optional subject? (a) If no supplementary book list is issued, must local officials come to Board for approval of purchases? Although practice says "yes", this may not be legally required. See arguments #1 and #2 above, box (F). (b) If Board issues list, approval still may not be necessary. See argument #2, above, box (F). (c) Regardless of whether a book list is issued subsequent to naming the formerly special subject as an optional subject, the Board's pre-emption of local control of materials may be found to be unlawful if it can be shown that the Board had a discriminatory purpose that contradicted the protected essential role of local boards in legislative scheme (and specifically the intended function of the "other special subjects" provision).
	Optional High School Subject	(H) No adoptions. (Local board independent authority over materials, so long as not grossly inconsistent with course of study prescribed by board, and approval by Board.)

FIGURE 1 (cont.)

Textbook Category	Subject of Instruction	Relationship (from local board perspective)
Ad hoc approved Basic Texts	Mandated Subject	(I) The function of the ad hoc procedure is to allow Board to waive the effect of prescribed text list, i.e., to approve a supplantation. Therefore, the ad hoc approval powers are not relevant to optional, special, and optional high school subjects.
Ad Hoc approved Supplementary Books	Mandated Subject	(J) If Board has issued a supplementary list, there is no specific supplementary authority allowing it to approve purchases off the list. However, since the legislature has given the Board authority fo approve basic textbooks off the basic textbook adoption (see above, box I) the legislature must have also intended that the Board be able to exercise the lesser power of approving supplementary books off of the supplementary list.
	Optional Subject	(K) Practice is to get Board approval. May not be necessary, however; depends on whether A.R.S. sec. 15-1101(B) applies to optional subjects. Even if the statute does apply, if the Board has not issued a list, there still may be no local board duty to obtain ad hoc approval, for the reasons stated in "contra", above, in box (E).
	Special Subject	(L) Local board has independent authority over materials. (See discussion, above, box G, of possible limits on Board authority to take over control of the subject by naming it an optional course.)
	Optional High School Subject	(M) No approval procedure. (Local board independent authority over materials.)

Figure 2: Relationships Between Budget Categories and Textbook Adoption Categories

Budget category \ Book Category	Basic Textbooks	Teaching Aids Related to Textbooks	Supplementary Texts	Other Unlisted Materials
Capital Outlay "CO" (no % limitation)	Includes all district purchases to fulfill obligation under sec. 15-442(A)(2)	25% of "textbook" line item in CO budget can be spent for these	NONE are in CO	NONE
Maintenance and Operation "M&O"	NOT APPLICABLE (Unless prescribed text for subject X is purchased for use in subject Y)			ALL
Regular M&O, (7% limitation)*		Purchases not fitting into 25% exemptions, above	ALL are M&O	(authority to purchase: Att'y Gen. Op. 61-138-L)
Special Education, Other State and Federal Special Programs (No % limitation)*	NOT APPLICABLE (Separate rules for content control)	NOT APPLICABLE	NA	NA

FIGURE 2, CONTINUED

FOOTNOTE

* There are special rules for applying the budget limitation to federal grants. The two normal channels for federal funding are: a) grant is made to the Board, and it apportions it among districts according to stautotry guidelines (A.R.S. sec. 15-1141 et. seq.); b) grant made to and accepted by local board (Attorney General's Office Letter, September 10, 1969.)

In the first case, federal monies received by the district from the Board are not subject to the limitation if several conditions are met. The basic requirements are that the money be used for a particular educational purpose, and that expenditures of federal funds in excess of the annual budget have the approval of the County Board of Supervisors. Also, quite aside from the budget question, the funds must be used as designated by the Board. Att'y Gen. Op. 68-9-L (1968).

In the second situation, although the district may apply for and directly receive federal grants, they are only exempted from the budget limitation if the district seeks and obtains the Board's approval of the program. Part and parcel of this approval is submission to the same degree of Board supervision as outlined in A.R.S. sec. 15-1141 et. seq., applicable to the first kind of grant. (Attorney General's Office Letter, September 10, 1969).

A 1972 conflict between the Board and the Mesa district illustrates both the impact of the budget limit in the federal grant situation, and the uncertain status of the Attorney General's letter, cited above. The National Endowments for the Arts (a federal entity) granted Mesa funds to hire an artist-in-residence. The Board "vetoed" the program. Lacking the approval required for avoidance of the limitation under the Letter, the district superintendent reported,

"This forced us to shrink our budget within the six per cent [former statutory limit] by $26,700." Phoenix Gazette, Nov. 7, 1972.

But there was another problem -- even though the Letter clearly implies that the board could receive the funds, albeit within the budget limitation, the Board acted as if the veto cut off the grant altogether. The district threatened to take the Board to court, but it subsequently managed to have a state agency act as conduit for the federal moeny. At that point, the Arizona Republic editorialized that although the rerouting appeared to be technically legal, the Board should take the district to court, trying to enjoin the use of the federal money. The Board, which was under fire from Superintendent Shofstall and other critics for its "out of habit" rejection of federal funds, did not file suit. Meanwhile, the Mesa board resolved to seek legislation that would make it unlawful for the Board to veto federal grants unless their use would be "contrary to existing state board courses of study, politics, rules or regulations." Phoenix Gazette, Nov. 7, 1972; Arizona Republic, Oct. 9 and Oct. 22, 1972.

(End of footnote to Figure 2)

between course prescriptions and textbook adoptions. Figure 2 shows how different kinds of materials are categorized in the local budget.

A. Relationships Between Textbook Adoption Categories and Subject of Instruction Categories (Figures 1-A and 1).

Our first problem is to correlate two sets of rules -- those dealing with textbooks and those dealing with subjects. There are four kinds of subjects:

(i) specifically required by a statute, or prescribed by the Board pursuant to statutory authority

(ii) prescribed by the Board as optional subjects

(iii) offered by the district under the independent authority of the statutory phrase, "other special subjects" in A.R.S. sec. 15-448

(iv) optional high school subjects, i.e., not required directly by statute, but prescribed by the local board and approved by Board (not uniform statewide)

On the textbook side of this scheme of curriculum regulation, there are two general kinds of books -- basic textbooks, and supplementary books. The classification of films, games, activity cards, laboratory sets, programmed tapes and other non-book materials pose special problems. Because these problems are primarily related to budgetary practices, our discussion of them is put off until section (B), which follows. The enabling provisions for the Board's authority regarding selection of basic textbooks and supplementary books is found in two enabling provisions:

A) "(The Board) shall prescribe textbooks for the common schools, and shall prepare a list of not less than three nor more than five textbooks for each grade and each subject taught in the common schools for the selection by the school district of one book from such list for each student . . . "[emphasis added] A.R.S. sec. 15-102(18)

B) "(The Board) shall annually prepare lists of approved and supplementary books from which the board of trustees of a school district may, with the approval of the state superintendent of public instruction, purchase supplementary books." [emphasis added] A.R.S. sec. 15-1101B

The drafters of these sections did not confront the fact that they had to be applied in several different legal contexts, each of which created its own set of interpretative problems. As we have just noted, there are at least four kinds of "subjects." The balance between state and local control is different in each one depending on the meaning of the textbook statutes. For example, where Board authority is at its weakest, (special subjects and high school subjects) a broad reading of the textbook provisions is least tenable.

In our chart, in Figure 1, we have laid out all possible pairings of textbook powers and course prescription powers. A number of legal issues are identified, and practical constructions -- implied by administrative practice — are noted. Perhaps the most important of these practical constructions is that the Board has only prescribed basic textbook lists for mandated[65] subjects. Taken literally, the language of sec. 15-102(18), "each subject", could be taken to mean that the Board can prescribe a basic text for each optional subject, or for each special subject. Although the latter reading would probably not hold up, (it would run directly counter to the independent local authority granted by the "other special subjects" provision) applying the phrase to optional subjects would have been reasonable (though not beyond serious legal challenge).

The main effect of this interpretation is to weaken Board control over materials used in optional courses. When a principal plans to purchase materials for an optional course, he still asks the Superintendent for clearance.[66] However, the Superintendent does not have the staff resources necessary to keep a close watch over supplementary book orders, to the extent of carefully shaping the content of optional

courses. By comparison, the requirement that a basic textbook be purchased for each mandatory course, and the legal prohibition against supplanting that text with supplementary books, makes the Board's control of the mandatory courses largely self-executing.

We have not yet explained the third and fourth textbook categories. Ad hoc approval of substitutions for prescribed basic textbooks is authorized in a portion of sec. 15-102(18) not included in what was quoted above. It says:

> "(A) school district may substitute a textbook for a prescribed textbook upon approval by the state board of education of an application for such substitution. . . "

The legislature's failure to include guidelines for the Board's passing on applications creates some doubt about how this procedure is supposed to be used. At the least, the law means that the Board should allow substitutions when a district can show a responsible educational purpose in using a non-listed book, a purpose which does not undermine an important state policy (e.g. a specific policy about substantive content of a subject, or a general policy of uniformity, or of acquiring market power against textbook publishers.)

Ad hoc Board approval of purchases of supplementary books not appearing on approved lists is a category created by practice, rather than by statute. This category may not be legally required. Arguably, whenever the Board does not bother to issue a list, the field is wide open for local purchases, so long as these purchases do not otherwise violate a law or binding regulation (e.g. by supplanting the basic text for the subject).

Besides direct statutory interpretation and administrative practice, official Board policy is another factor that affects the relationship

between textbook selection and the prescription of subjects. The Board has appointed "Course of Study Committees" to draw up curriculum frameworks for various subject matters. The report of one of these advisory committees, when adopted,[67] becomes the content criteria for textbook selection by the Board's Textbook Evaluation Committee. These criteria are not intended to prevent local educators from enhancing the curriculum, however. The Board Regulation A.C. R.R. R7-2-301[68] states:

> "The Course of Study prescribed by the State Board of Education provides the basic minimum course content in each prescribed subject area to insure a minimum quality education in compliance with Article XI, Section 1 of the Constitution.
>
> The State Board of Education reaffirms that the Board is not limiting local districts and/or teachers from enriching and enhancing the minimum course content but rather encourages local districts to excel way beyond these basic standards." [emphasis added]

Many Board members and committee members acted contrary to this policy in the 1970's. They tried to adopt courses of study that were so detailed, and textbook lists that were so narrowly tailored to their own philosophies, that if they had succeeded there would have simply been no room for local districts to "enrich," "enhance," or "excel." Complying with all of the lesson plan details would have left little time for anything else, and ordering materials to go along with the local instructional variations would have been difficult.

The official policy concept of a basic minimum, however, makes good sense in the statutory framework. Together with the rule against supplantation, and the economic objectives for centralized textbook selection, it provides a way to determine the scope of Board curriculum powers: The Board's affirmative curriculum enactments must meet the test of contributing to a reasonably defined basic minimum. (Excessively

detailed rules and learning objectives which are not "basic," but required by a peculiar system of values, do not pass the test.) The Board's prohibitions on local curriculum actions must meet the test that those actions would otherwise result in a supplanting of the basic minimum, or would seriously jeopardize Arizona's bargaining power with publishers. The Board's practice of not issuing supplementary book lists for optional courses is consistent with this scheme of basic minimum plus local initiative.

B. Relationships Between Textbook Adoption Categories and Budget Expenditure Categories (Figure 2)

It's not enough for a district board to have the right to purchase a set of curriculum materials -- it also needs money. The governing board has the final word on expenses and local appropriations for capital outlays. Under A.R.S. sec. 15-1202.06, the board notifies the county superintendent of its CO budget, and the superintendent notifies the county board of supervisors, who must,

> "make a levy on the property of the school district sufficient to produce revenues for the payment of these expenses."

These revenues pay for "textbooks" and for some "teaching aids," because the statutory budget format classifies those items under CO.

Left out, however, are other "teaching aids," and "supplementary books." These belong in the category, Maintenance and Operation (M&O). The board's fund raising powers are more limited in that area. The district is bound to appropriate funds to cover the M&O budget only if current year M&O has increased over the previous year's amount[69] by less than 7%.[70] If the per cent limitation is not met, the budget is not official until approved in a special budget election, by a majority of those voting.[71] It makes planning much easier for the board members

if they can keep within the per cent limitation and therefore avoid the risk of a budget rejection at the polls.[72] Given the rates of inflation in the late sixties and early seventies, however, it is difficult to meet that goal. The purchase of curriculum enrichment materials is the kind of "marginal" expenditure that is most likely to be slated for elimination.

Given these budgetary pressures a school principal ordering supplementary materials will ask, how can these be budgeted as CO rather than as M&O?

To qualify for CO treatment, the materials must be either "textbooks," or "teaching aids related to textbooks." The Board has defined "textbook" as:

> "The total instructional materials selected as the basic source of instructional materials for use in teaching pupils in the subject areas as established by the State Board. This may include materials, equipment, and illustrative material as well as the more traditional textbook." [emphasis added] A.C.R.R. R7-2-301, p. 87.

The definition appears in the regulations establishing procedures for the State Textbook Evaluation Committee. As the underlined language suggests, only materials adopted as prescribed texts for prescribed subjects can be textbooks. Other equipment, illustrative material and traditional textbooks can be "supplementary books." These are defined by the Board as:

> "Any textbook (as defined above) (referring to above-quoted passage) intended to serve, but is not limited to, one or more of the following purposes . . .
>
> "1. To provide more complete coverage of a subject or subjects included in a given course.
>
> 2. To provide for meeting the various learning ability levels of pupils in a given age group or grade level.
>
> 3. To provide for meeting the diverse educational needs of pupils with a language disability. . .

4. To provide for meeting the diverse educational needs of pupils caused by a condition of cultural disparity." A.C.R.R. R7-2-301, p. 87.

Because these definitions eliminate the distinction between traditional textbooks and other forms of instructional materials, the classification of a purchase order can turn on subtle differences. Take, for example, the purchase of a "lab kit" containing test tubes, chemicals, electrical parts, etc., which is designed for use in a science course:

(a) It is textbook and gets CO treatment if it is named in the description of one of the 3-5 basic science texts adopted by the Board for the grade level and subject for which it is purchased (provided, of course, the school has actually selected a textbook which includes the kit).

(b) It is <u>not</u> a textbook, but can get CO treatment nonetheless, if it is <u>not</u> named by the Board as part of a basic set of source materials but it <u>is</u> <u>related</u> to a set of such materials and the board is purchasing them. However, there is a special limitation on the amount of the capital budget which can be spent in this way:

> "One-fourth of the amount budgeted for textbooks may be expended for teaching aids relating to the textbooks selected." A.R.S. sec. 15-442(A)(2)

Thus, if the science textbooks cost $7,500, an additional $2,500 can be spent on related aids in the capital budget. When the entry is finally made, the expenditure for aids will not exceed 25% of the total item.

(c) If the conditions in (b) are satisfied, except that the expense exceeds the 25% limitation, the excess spills over into M&O.

(d) If the laboratory chest was not "related" to the selected basic textbook, but the district nonetheless had the right to purchase it for enrichment purposes (under Att'y Gen. Op. 61-138-L), the expenditure is M&O. A standard for "relatedness" is nowhere spelled out. A lab set, for example, could be adapted for demonstration of the concepts being taught in virtually any general science textbook. Therefore, under a common sense notion of relatedness, it would almost always fit into category (b) or (c). A more narrow, technical interpretation could require that the use of the laboratory materials be spelled out in the basic materials, or even that the kit be marketed by the same publisher as the basic materials and represented as being part of the same program. Since there is no authority requiring the application of a technical definition, one can assume that the common sense meaning of the term applies. Thus, any time local officials acting in good faith and exercising reasonable professional judgement (or ratifying the judgement of their agents) classify a purchase as M&O because it is related to a basic textbook, state officials should not be able to substitute their judgement about the classification.

Supplementary books are budgeted under M&O. The above-quoted definitions appear to allow for some purchases to fit the definition for a supplementary book (M&O) or for a teaching aid related to textbooks (CO). For example, suppose the laboratory set was to be used by pupils as an advanced activity whenever they had mastered the concepts in the

basic text ahead of schedule. The chest would fit into the "more complete coverage" provision of the definition of supplementary book. But it also would be a teaching aid related to the basic text. We think the statutory provision for budgeting related teaching aids as CO should take precedence over the administrative definition. There is nothing in the legislature's few references to supplementary books which indicates an intention to limit the budgeting flexibility confered by sec. 15-442. Rather, the legislature already built a limitation into that very section -- the 25% requirement.

So far, we have only talked about the situation in which local educators try to include materials in the capital outlay budget in order to avoid the per cent budget increase limitation. There can, however, be countervailing incentives. If there is a desire to purchase materials which state officials may not favor, budgeting them under M&O may decrease the likelihood that the purchase order will be closely scrutinized in the Department. Similarly, when a given material can arguably be classified either as a supplementary book or as a teaching aid unrelated to the basic textbook, treating it as an unrelated aid obviates the need for Board approval for the purchase.[73] Budget-wise, there is nothing to lose, since in either case the expenditure is M&O. The Attorney General has held that the districts have independent authority to purchase unlisted teaching aids -- subject to the statutory limitation that they not be purchased in such quantities that they supplant the basic textbooks. (Att'y Gen. Op. 61-138-L).

2. Compliance: Rule Against Supplantation

After probing the many subleties in prescribing courses of study,

adopting textbooks, and classifying purchases of materials for budgetary purposes, one can see that the question whether a particular local action has violated a statute or a valid Board regulation can be multifaceted. The only statutory reference to a standard of compliance, appears in sec. 15-442(A)(2), which states:

> "District school funds may be budgeted and expended by the board for supplementary books, as contained in the lists prepared by the state board of education . . . provided that supplementary books shall not be purchased in such quantities as to take the place of the textbooks prescribed by paragraph 18 of §15-102." [emphasis added]

Despite the reliance on quantity as a criterion for compliance, the underlying concern here is how instructional materials are to be used. The purchase of a large quantity of supplementary books creates a presumption that they will be used as substitutes for the prescribed textbooks.

What makes the standard awkward is that it is only geared for intervention at one stage in curriculum development -- when purchase orders are sent to the Board for approval. This forces the Board to exercise control through prior restraints. The statute relies on the empirical assumption that the greater the quantity of supplementary materials purchased, the more likely they will be used to supplant the basic text. The Board might consider factors additional to this simple recipe -- e.g. any prior history of use of the materials in the district; the willingness of officials to give assurances that the materials will be used properly.

Dissatisfied with this one-shot regulatory procedure, the Board has tried to fashion the supplantation restriction into a handle for continuing control over the use of teaching materials. Hence, it drafted the following affidavit, and then enacted a regulation requiring that local educators sign it under oath.

"This is to certify that each school in the _____ school district no. _____ has purchased state adopted textbooks as prescribed by ARS 15-102.18 and ARA 15-442A.2 and as published in the current official list of state adopted textbocks. These state adopted textbooks are being used as the basic source of instructional materials and other books and/or materials are not being used to supplant the state adopted texts."

SIGNED _____
SUPERINTENDENT, PRINCIPAL, OR HEAD TEACHER

NOTARY _____
IF APPROPRIATE PLEASE LIST AREAS AND REASONS FOR NON-COMPLAINCE
[emphasis added].

The affidavit creates a juncture between authority over materials and control of school personnel -- refusal to sign, or making a false certification would be grounds for the Board to revocate teaching and administrative credentials. Additionally, the Board's regulation warns that failure to comply with the textbook prescriptions is a violation of A.R.S. sec. 15-442, which will result in suspension of funds.[74]

The affidavit was promulgated in November, 1973. It is a fitting symbol of the state-local antagonism and distrust of the early 1970's. More enforcement machinery was put in place by Superintendent Shofstall in March 1974.[75] He set up a dual procedure. First, the deputy superintendent was charged with examining orders for non-textbook teaching aids; he was to approve them once he determined they were not "intended to supplant the approved textbook." Second, there was established a (poorly articulated) system for reviewing purchase orders for supplementary textbooks in subject areas where the Board had not adopted any supplementary book lists.[76] Under this system, the deputy superintendent is supposed to make a close examination of any order. Then --

> When quantity appears to supplant . . . the district will be contacted and the purpose clearly established and documented. [emphasis added]

> When the content/quality is questionable, a review committee (three Subject Matter Specialists) will adjudge the materials as requested for purchase.

In the situation of suspect quantity, there is no mention of any appeal from the deputy's findings. In the case of suspect content/quality, the review committee's findings can be appealed to the State Textbook Committee.[77] The latter "will be requested to review the material for a second time." It is not clear from this clause -- a) whether the textbook committee is obliged to adjudicate the appeal or b) whether the committee, if it does consider the case, must review the questionable materials de novo. The committee makes a recommendation to the State Board and that report "constitutes closure of the appeal procedure."

Research for this report was completed too soon after the establishment of these procedures to permit an evaluation of their impact. One elementary school principal gave a summary of the situation before the attempted crack-down. He said that he had permitted teachers to teach entirely out of "supplementary materials" in instances when they had persuaded him of the educational advantages of their approach. In his school, the core of reading instruction was a program not adopted by the state. It was this principal's understanding that to "supplant" the official texts was to use other materials more than half of the time. He estimated that about two-thirds of the schools were in substantial compliance with that standard.

An important factor in the success of the scheme would have to be the amount of staff resources the Department threw into the project. So far, there has been no practice of on-site state inspection. Meanwhile, the districts, especially larger ones, can throw up smokescreens of paperwork that hide expenditures inconsistent with state curriculum

policies. To pore over hundreds of line items in purchase orders, project their combined effect on curriculum, and then follow up suspicious entries with letters and field investigations, would be an ambitious undertaking.

Besides investigatory resources, another unknown is the substantive standard against which patterns of purchase and instruction are to be measured. The term, "supplant," relates to the quantity and quality of supplementary materials, and to the amount of time they are used in the classroom. But concrete examples are lacking. Superintendent Shofstall delegated authority to evaluate one class of materials to his deputy superintendent and he let the State Textbook Committee adjudge another category. But whatever rules these adjudicators might develop on a case-by-case basis would be reviewable in the courts.[78]

The closest the Attorney General came to defining supplantation was in an opinion where he said that the Board had authority to prescribe and enact guidelines for either a mandatory or optional course in sex education. Answering a question about local district authority to present such a subject he stated,

> A local elementary school district may enrich and expand upon the course of study and curriculum prescribed by the State Board of Education and this may be accomplished through the use of supplementary materials and books. The supplementary materials and books used in the expansion of the adopted textbooks must relate to and come within the sphere of the prescribed course of curriculum. [emphasis added] Att'y Gen. Op. 69-17-L at 99 (1969).

The Attorney General's opinion makes note of the right and role of the elementary district to exercise substantial control over the details of curriculum. The evolving Board compliance procedures, on the other hand, tend to make one lose sight not only of the protected area of local discretion, but also of the brief and ambiguous statutory phrase about

supplantation which is the very basis of all of the Board's review mechanisms and threatened sanctions.

was a good chance that the request would be granted and the hearing would be fairly conducted.[1] In fact, the Court of Appeals had held that when a statute expressly provides both for administrative and judicial appeals, there still is no exhaustion requirement unless the law also states that administrative review is a condition precedent to judicial review. Campbell v. Chatwin, 4 Ariz. App. 504, 421 P.2d 937, reversed on other grounds 102 Ariz. 251, 428 P.2d 108 (1966).

A full complement of administrative review procedures usually leads to an exhaustion doctrine which is a significant obstacle to a plaintiff who knows that the education agencies will view his claim unfavorably whereas a court might grant him relief. The plaintiff must expend time and resources on the administrative process. Moreover, a court's review of a detailed administrative record will be more restrained than a de novo hearing. Consequently, in a state like New York, plaintiffs try to escape administrative proceedings by bringing themselves under exceptions to the exhaustion doctrine. One of the most important exceptions is the distinction between a claim alleging a clear statutory violation by the agency, and a claim alleging abuse of discretion. It is generally held that, because courts are more expert in interpreting law than are administrative agencies, an exhaustion doctrine cannot bar a court from taking jurisdiction over a case turning on issues of law rather than of policy. Since the exhaustion doctrine is relatively unimportant in the Arizona school cases, it is not surprising to find that this exception--the law/policy distinction--is hardly discussed in the cases.

While exhaustion is less of a problem for the Arizona plaintiff than for his counterparts elsewhere, he must surmount two other obstacles

before a judge will overrule a school official. First, many administrative decisions are either a) unreviewable, b) reviewable only within a short period of time, or c) reviewable only by petition of a narrow class of persons. Reviewability is discussed generally in subsection A, and standing problems are focused on in subsection C.

Second, Arizona courts have very narrowly defined the scope of their review of decisions of school officials. This problem is discussed in subsection B.

A. What official acts are reviewable?

In Allen v. Graham, 8 Ariz. App. 336, 446 P.2d 240, 243 (1968), the Court of Appeals stated,

> "[A] right of appeal is not essential to . . . due process of law."

Arizona courts are reluctant to find a right of review (in non-constitutional cases) except where a statute clearly provides for it. In school cases, one ordinarily looks to one or more of these statutes:

1. Judicial Review of Administrative Proceedings Act (JRA), A.R.S. §§12-901 et. seq.
2. Mandamus Act, A.R.S. §12-2021 (a writ of prohibition or another special action is sometimes used in analogous fashion).
3. Declaratory Judgment Act, A.R.S. §12-1831 et. seq.
4. Teacher Tenure Act, A.R.S. §15-251, et. seq.

1. The Judicial Review Act

The JRA provides for review of final decisions by public agencies. The complaint must be filed within thirty-five days after a copy of the decision to be reviewed has been served on the petitioner. The

availability of this right depends heavily on the definitions of "agency," "decision," and "final."

AGENCY

"means every agency, board, commission, department or officer authorized by law to exercise rule-making powers or to adjudicate contested cases . . ."

"does not include an agency in the judicial or legislative department of the state government, and does not include any political subdivision, municipal corporation, or agency thereof."

DECISION

"means any decision, order or determination . . . rendered in a case which affects the legal rights, duties or privileges of persons and which terminates the proceeding before the administrative agency."

"does not mean . . . rules, regulations, standards or statements of policy of general application . . . nor does it mean . . . regulations concerning the internal management of the agency not affecting private rights or interests." [emphasis added]

FINAL

"[When a statute or rule] requires or permits an application for a rehearing or other method of administrative review, and an application . . . is made, no administrative decision of such agency is final as to the party applying therefor until the rehearing or review is denied, or the decision on rehearing is rendered."

If review is not sought within the thirty-five day time limit,

"the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such decision." A.R.S. Sec. 12-902(B).

State and local school boards have rule-making powers, and are considered agencies under the Act. The Superintendent of Public Instruction, in exercising some of his duties, makes decisions which can fairly be characterized as the deciding of contested cases. In Kimball v. Shofstall, 17 Ariz. App. 11, 494 P.2d 1357 (1972), JRA review was allowed on a complaint by a local superintendent that his administrative credentials

had been improperly revoked by the Superintendent and the Board. Arguably, when a principal, teacher, or other low echelon school official exercises a quasi-judicial power which is directly authorized by statute, the JRA will apply. For example, A.R.S. §15-204, vests the power to suspend pupils in various persons. (In schools which do not have a superintendent or principal, this power vests in teachers.) Ordinarily, one would expect an aggrieved student to appeal first to the local board, after which appeal under the JRA would be a matter of course.

In one reported case, however, a pupil suspended by a part-time administrator successfully brought a mandamus action without first appealing to the local board.[2] The only question in the case, as the appeals court saw it , was statutory interpretation--whether an assistant administrator in that school could ever suspend a pupil on his own authority. The writ was directed at the board, which was told to rescind a clearly unlawful order. In a different case, where the authority of the official to suspend pupils was conceded and the claim was that he had abused his discretion it could be argued that a mandamus action could not lie--even if the board has a legal duty to reinstate the student, it is not on these facts a ministerial duty. Rather, it is a duty lying at the not easily discernable intersection of law and policy. This argument, though logical, runs against the customary use of the mandamus action to challenge suspensions in Arizona (see 470 P.2d at 117). If the mandamus action were held to be improper, however, the student could petition the board for a hearing, and then seek review of the hearing under the JRA.

The JRA excludes from its coverage any agency whose decisions, under a separate act, are subject to review by a "definite procedure."[3] There can be a partial exclusion. For example, while teacher dismissals are covered by the Teacher Tenure Act, other local and state board actions remain under the JRA.

Once it is determined that the defendant has sufficient authority to be an "agency", for purposes of the JRA, the plaintiff must additionally show that the particular act he is challenging is, under the JRA, a "decision." In State Board of Pardons and Paroles v. Superior Court,[4] the Court of Appeals analyzed a joint decision-making mechanism. The governor had sole authority to commute a sentence but he only could act after receiving a recommendation from the Board of Pardons. The court held that neither a failure of the Board to consider a request for commutation, nor its decision not to recommend one, was a "decision" for purposes of the JRA. However, the appeals court ordered the trial court to give the plaintiff leave to amend his pleadings, substituting an action by special writ for the JRA claim. The principle of "essential justice," it was said, justified that alternative under the facts of the case. (The scope of the trial court in hearing the special action was limited to determining whether the Board's treatment of the plaintiff's request had satisfied the requirements of procedural due process; the court could not substitute its judgment for that of the Board on the issue of commutation.)

Board of Pardons may limit the applicability of the JRA in areas where authority is jointly exercised by a school board and a superintendent. Shared decision-making is not uncommon under state law and local rules. It has been especially popular in recent reform proposals, where it is probably intended to prevent recurrence of extreme and irratic behavior by the State Board of Education. For example, Senate Bill 1071 (January 1975) alters the power of the Board, in part, as follows:

> "[The Board has authority to:]
> 13. Recommend, after receiving recommendations from the Department of Education through the Superintendent of Public Instruction, the number of credits necessary for graduation from high schools.

14. Adopt upon recommendation of the Superintendent . . . rules and regulations for the certification of teachers . . ." Proposed revisions for §15-102, page 3.

The class of reviewable "decisions" was narrowed on another dimension in Arizona Commission of Agriculture and Horticulture v. Jones, 91 Ariz. 183, 370 P.2d 665 (1965). The narrow issue in that case was whether a board could treat its renewal of a regulation as a denial of a party's request to be exempted from that regulation, and at the same time keep immune from JRA review because the form of its action was rule-making. The broader issue was the extent to which the JRA could bar a challenge to a board order which survived the original period of review (petitions filed within 35 days) but which, it is alleged, based on facts which changed. Jones will be described in some detail because of its potential applicability to challenges to the State Board of Education's new Policy Book. As each chapter of the Policy Book is adopted, it is filed with the Secretary of State, in order to start running the 35 day appeal period. Theoretically, any challenges made subsequent to that period will be untimely, and the rules will be immune from judicial review under the JRA.

In Jones, the Agriculture Commission had put restrictions on the use of cotton-growing land, under a statute authorizing such measures when the Commission has determined (after notice and hearing) that a pest or disease threatens the state's agriculture. Such a determination was made in 1958. In 1961 the respondents filed a statement with the Commission asking to be excepted from the restrictions. The statement was read into the record, and the commission stated that it would consider the petition before re-enacting the restrictions. The commission, however, took no formal action on the request, and when it issued a decision supplementing

the regulation the respondent sought review under the JRA. Three justices decided, however, that the supplementing of the regulation was not an action subject to JRA review, because of the phrase in the statute saying that "decision" —

> "does not mean . . . rules, regulations, standards or statements of policy of general application . . . " A.R.S. sec. 12-901.

Justice Jennings, dissenting, insisted that the commission's action in issuing the regulation did amount to an adjudication of the respondents' complaint:

> "[R]espondents were absolutely correct in assuming that such action constituted a denial of the redress they were seeking . . . " 370 P.2d at 670.

The disagreement between Jennings and the majority as to whether a §12-901 "decision" had been made was itself a function of a dispute about the meaning of the JRA's rule that final decisions are unreviewable after thirty-five days. The majority characterized the request filed by respondents as a collateral attack on the Commission's 1958 finding that a condition of danger existed. As such, there was no authority for judicial review because

> "[n]o means has been provided by the legislature by which an interested party may compel such a determination." 370 P.2d at 669.

The majority quickly added that due process and equal protection of law required that persons have the right to <u>directly</u> challenge, within a reasonable time, the factual predicate on which a regulation affecting their interests is based. The constitution obligated the agency to hold a hearing under these circumstances, even though the statute provided for no suitable procedure. In the present case, however, there was no direct attack with a timely petition.

Jennings, on the other hand, argued that the only logical way to interpret the statute authorizing the regulations was that it kept the question of the factual predicate "open forever." He noted the section of the law which says the commission "shall revoke the order establishing the zone" when it finds the danger no longer present. This, he says, means that

> "whenever by suggestion of any kind it appears that there may be a question on this point, the . . . commission [must] specifically make a finding." 370 P.2d at 670. [emphasis added]

The phrase, "suggestion of any kind," would vitiate the majority's distinction between direct and collateral challenges.

The Jennings interpretation of the JRA, and his mode of harmonizing that Act with the agricultural quarantine statutes, makes judicial review of certain kinds of administrative actions much more available than under the majority's rule. To sum up the differences, the majority states that so far as the JRA and the agricultural statutes are concerned, the factual determination made in 1958 was a decision reviewable under the JRA, but only for thirty-five days. Under some circumstances, the constitution would nevertheless oblige the agency to reassess its fact finding in a later proceeding, and that proceeding would then be subject to court review under the JRA by a complaint filed within thirty-five days of the final decision. It was not necessary to reach this constitutional issue, however, because the complainants in this case had never petitioned the agency for direct review of the 1958 decision.

On the other side, Jennings says that--as a matter of statutory law -- each successive rule-making based on the continuing validity of the 1958 finding was a redetermination of the 1958 finding. Any party who had formally petitioned the agency for a contrary finding, and whose

interests were affected by the redetermination, was an aggrieved party with a right to review under the JRA.

The holdings in Board of Pardons and in Jones can determine when a plaintiff will be denied review on one of these grounds:

a) There is no "decision" cognizable by the JRA to which the complaint relates. The challenged administrative action must be characterized as:

(i) a recommendation,

(ii) a rule-making proceeding, or

(iii) a discretionary avoidance of an adjudication.

b) The complaint asks for review of a decision made more than thirty-five days previously, and therefore is too late. In this category, we are interested in the situation in which there was some administrative action (or calculated inaction) within thirty-five days. However, the court deems the factual finding underlying this action to relate back to an earlier agency decision. (For example, in Jones, the challenged agency rulemaking in 1961, which effectively denied the plaintiff's petition to the agency, was deemed to relate back to the 1958 factfinding. Jones also fits under category (a)(iii), above. The 1961 rule-making was a discretionary failure to decide. But for the 1958 hearing, the Jones court would have found that the agricultural statutes entitled plaintiff to a reviewable adjudication in 1961.

We will examine two settings in which these rules can apply to decision-making by education agencies. First, we consider the reviewability issues that are latent in the Board's promulgation of its new Policy Book. Second, we look at the connection between the right to a hearing and the

right to court review. Examples used in the second part are: a) a suit against the Board to restore textbook funds to a local district, and b) the suit by a student against a local board to have his educability re-evaluated.

Reviewability and the Policy Book

The Policy Book is supposed to set uniform goals for instruction in the state and to bring local practices in conformity with them. Its text ranges from broad philosophical statements, to specific orders, to lengthy quotations from statutes and attorney general opinions. Before the Board started composing the book, and filing its sections with the Secretary of State, compilations of its rules and policies were so disorganized that rarely could a complainant be charged with constructive notice of them. Consequently, unless actual notice was proven, the Board could not set up the thirty-five day limit of the JRA as a bar to judicial review of the validity of prior decision which seems to control the instant ca

Here is an example of a reviewability question involving the Policy Book. On 26 November 1973, the Board approved the following rule:

> "[E]ach student shall demonstrate ability to read at a ninth grade level of proficiency as shall be established by the local district, prior to graduation from high school."

The rule was filed on 22 January 1974, and appears under section five, "Graduation Requirements."[6] Under the Board's view, if a student was refused a high school diploma in June 1974, he could obtain a hearing on the question whether the rule had been properly applied, but he had no right to an administrative or judicial review of the validity of the rule

on its face. The student had constructive notice of the rule effective 22 January 1974, and if he was aggrieved by that decision (and a party to proceeding) he had thirty-five days to appeal it.

Assuming that the student has no constitutional ground for invalidating this rule, his best bet for defeating the Board's door-closing strategy would be to bring himself under the Declaratory Judgment Act (DJA). He would say that the rule was not the product of a JRA "decision." That is, the Board had not made a decision which had become immune from attack after the thirty-five day period; rather, it had made a regulation which the student -- who was involved in a justiciable controversy -- could challenge under the Declaratory Judgment Act.[7] This argument is especially strong in the context of education regulations. There is little assurance that high school students are adequately represented during Board rule-making proceedings (and rarely are any of them parties to the proceeding, which is a condition for being a JRA plaintiff.) However, a student may be willing and able to pursue his individual case with vigor. By comparison, the difference between policy-making by rule-making and by adjudication is not as significant when large economic regulatory agencies are involved -- the persons primarily affected by SEC and FTC actions are likely to be adequately represented in relevant proceedings, regardless of whether they are adjudication or rule-making. Consequently, a ruling that the statement of graduation policy was a "JRA" decision immune from challenge in a declaratory judgment action would be unusually harsh.

The above example was based on a concrete and specific policy statement. A more general policy would call for a different kind of plaintiff's argument. Here is a broad rule which appears in the Policy Book:

> "Textbook Content shall not interfere with the School's legal responsibility to teach citizenship and promote patriotism." Rule 7, §B(10)

A student who becomes aggrieved by an application of this policy may, as

an alternative to trying to use the DJA, argue that the rule is so vague that it is virtually without content until applied. Thus, he is entitled to judicial review under the JRA of the validity of the rule as applied in the proceeding affecting him (if he files his complaint within thirty-five days of notice).

Hearing rights and reviewability

When an education agency's decision, or avoidance of a decision, seems to be based on a specific factual premise, the Jones holding may be applicable. For example, suppose the Board voted to cut off textbook funds to a common school district after making a finding that the district has "supplanted" the state-prescribed curriculum with outside materials. Five months later the district petitions the Board to hold a hearing where it offers new evidence of compliance, and petitions the Board for a formal hearing to review the fund cut-off. If the Board holds a hearing at which the district directly attacks the first factual determination, an adverse Board decision clearly is reviewable under the JRA.[8] But what if the Board ignores the petition, or rejects it sub silentio in a rule-making proceeding that decides the relevant issue (as in Jones)? Unless an education statute expressly required a hearing in this situation, Jones would appear to apply. Petitioners would have no right to a hearing unless they could show that the constitution guaranteed one. By contrast, a lawyer trying to press the Jennings form of analysis would argue to the court that the policy of the education code was to leave this kind of factual determination "forever open." He could rely, for example, on statutes providing for the delivery of educational services and on the

state constitutional provision which requires that public education be "as nearly free as possible."[9]

The persuasiveness of a "forever open" argument will depend on the nature of the issue in dispute. If the dispute is about the instructional needs of a particular child, allowing a school official to rely indefinitely on one factfinding would be unconscionable, given a child's capability for rapid changes in attitude and performance. The Legislature is originally in the best position to strike a reasonable balance between a child's interest in receiving services based on current evaluations, and the school's interest in efficient management of its instructional programs and diagnostic services. Planning is an element of efficiency; to plan the school must be able to rely for some time on prior factfindings. In the Special Education Act, the legislature gives to children who are in "special" placements the right to be re-diagnosed two times each year. Unfortunately, rarely has the legislature provided so express a solution to a conflict between the policies favoring repose and those favoring re-evaluation. Consequently, Arizona courts will continue to be called upon to find that particular plaintiffs have a constitutional right to a hearing, or an implied statutory right to one.

The logic of Jones, and Board of Pardons, makes the right to judicial review under the JRA turn on the right to an administrative hearing. Because the term "decision" is narrowly defined as a formal adjudication which expressly addresses and finally decides the complainant's grievance, there is no right to review under the act absent a proceeding which amounts to a hearing. This interpretation forces litigants to make claims of constitutional entitlement to administrative hearings. This pressure for constitutionalizing an area that would best be governed by carefully

delineated state educational policies could be alleviated by a) legislation comparable to the Special Education Act; b) judicial willingness to find implied hearing rights in education statutes, using the sort of analysis Justice Jennings applied to the agricultural statutes in Jones; c) re-interpretation of "decision," to permit review of administrative actions which lack the form of an adjudicatory hearing, but have virtually the same effect on the petitioner.

2. The Mandamus Act

A.R.S. §12-2021 provides in part:

> "A writ of mandamus may be issued . . . on the verified complaint of the party beneficially interested, to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office, trust or station . . . "

Mandamus may be an alternative basis for judicial review of the actions of school officials when the JRA either affords inadequate relief or does not apply. The courts, however, have stressed the extraordinary nature of this remedy, and the strict conditions limiting its use. The relevant holdings are summarized below.

First, mandamus may not be used to control the discretionary actions of officials. The writ may compel performance of a ministerial act, that is, a duty which an official must perform upon the occurrence of conditions which are outside of his control. The courts, however, have no authority under the mandamus statute to create, by implication from an ambiguous statute, a ministerial duty. State ex rel. Williams v. Superior Court, 18 Ariz. App. 92, 500 P.2d 352 (1972).

A statute which authorizes an official to exercise discretion in reaching a decision may, at the same time, impose an absolute duty that he

actually render a decision. (That is, under some circumstances it is not within his authority to decide not to decide the question.) Thus, a court may issue a writ of mandamus ordering an official to render some decision that is within his discretion to make.

Similarly, if an official makes a decision that is not within his authority to reach (and if there is no adequate remedy at law) mandamus may be used to undo the damage. However, the court still must refrain as much as possible from substituting its own judgment for that of the designated decision-maker. In State Board of Technical Registration v. Bauer, 84 Ariz. 237, 326 P.2d 358,361 (1958), the Supreme Court stated:

> "The court may not by mandamus invade the discretionary power of an administrative board unless it clearly appears that in its exercise it has been guilty of an abuse thereof [citations omitted]."

The second requirement is that there clearly be no adequate remedy at law. Thus, if an official has contracted with teachers to consult with them, and then he refuses, the teachers may not obtain a writ of mandamus ordering him to meet with them. Their sole remedy is on the contract, even if it is unenforceable. Board of Education of Scottsdale High School District No. 212 v. Scottsdale Education Association, 109 Ariz. 342, 509 P.2d 612 (1973). On the other hand, if a statute requires an official to enter into a contract with employees, a writ of mandamus will be issued to compel performance of that duty. Board of Education, Tucson High School District No. 1 v. Williams, 1 Ariz. App. 389, 403 P.2d 324 (1965).

The availability of review under the JRA is ordinarily considered to be an adequate and speedy remedy at law. Rhodes v. Clark, 95 Ariz. 31, 373 P.2d 348 (1962).[10] However, plaintiffs are not required to rely on the

JRA in place of equitable remedies when the defendants have failed to adequately publicize the existence of administrative review procedures. Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972).

3. The Declaratory Judgment Act.

Arizona has adopted the Uniform Declaratory Judgment Act which provides, in part,

> "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." A.R.S. § 12-1831.
>
> "Any person interested under a . . . contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under [it] and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832.

The most important limitations on the use of this action are that there must be an actual, justiciable controversy, and that the plaintiff must have a present legal right against the defendant with respect to which he is generally entitled to some form of relief. In Riley v. Chochise County, 10 Ariz. App. 55, 455 P.2d 1005 (1969), the county and county supervisors sought a declaration that they were authorized to pay private attorney's fees in connection with certain litigation. The defendant was the county counsel who had threatened to sue the county if the private attorneys were paid. The court ruled that it had no jurisdiction over this dispute because the requisite adversity necessary for a declaratory action was lacking. The county attorney, acting in his own right, had no basis for a claim against the plaintiffs.

> "[T]he members of a county board of supervisors may be jointly and severally liable for payment of unauthorized expenditures . . . . This claim, however, whether the action be instituted by the county attorney or by a taxpayer . . . belongs to the county and not the county attorney. [A controversy could arise between the county and the board members as individuals but the] county attorney . . . has no real interest in opposing the declaration sought."
> [first emphasis added]. 455 P.2d at 1010.

In short, the complaint merely alleged a difference of opinion among public officials, which was not a sufficient basis for declaratory relief. The usual practice in Arizona is for disagreements between officials to be referred to the Attorney General's Office for advisory opinions, even when a declaratory action would be available.

In Arizona Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972), students at a state college (who had been classified nonresidents) asked for a declaratory judgment that the Regents' policy setting higher tuition rates for nonresidents was unconstitutional. The Regents had created a procedure by which students could appeal their classification as far as a Residency Committee. However, few if any students were told about this administrative appeal, and some were given misleading information by lower echelon officials. Under these circumstances the court adjudicated the declaratory judgment action, but it also ordered the Regents to appropriately publicize the appeal procedure, making clear that any future court actions would have to be conducted pursuant to the Judicial Review Act, after administrative hearings before the Residency Committee.

4. The Teacher Tenure Act.

The Teacher Tenure Act, A.R.S. § 15-251 et seq., establishes job security rights for teachers (predominantly procedural ones). It contains the only judicial review provision in the education code. A.R.S. § 15-255 provides in part:

> "A. The decision of the board shall be final unless the teacher aggrieved files, within ten days after receiving the notice of termination, an appeal with the superior court . . . ."
>
> "B. On appeal, the court shall hear and determine the matter de novo, not less than twenty or more than forty days after the date the appeal was filed. Pending the determination of the appeal, the decision of the board shall remain in full force and effect, and may not be superseded."

Although only a "termination" is reviewable, the court will take jurisdiction over board decisions that seem intended to force a teacher's resignation. (In some states, a reduction in a teacher's rank, combined with a salary reduction is deemed to be a "dismissal" for purposes of review. The Arizona Supreme Court has declined to adopt this rule, stating that its purposes are already accomplished in the provision of the Arizona statute prohibiting reduction in a teacher's salary except as part of a district-wide reduction. Williams, supra, 403 P.2d at 329.)

As for the meaning of "teacher", counseling duties are considered to be teaching, or at least to be a function of no higher rank than teaching; Williams, supra, 403 P.2d at 329. A school administrator is not entitled under the Act to obtain review of his dismissal by the State Board of Education, Kimball v. Shofstall, 14 Ariz. App. 11, 494 P.2d 1357 (1972).

A party who may take a §15-255 appeal is usually found to have an adequate remedy at law, thus making unnecessary the issuance of writs of mandamus or certiorari. But not always. In Forman v. Creighton School District No. 14, 87 Ariz. 329, 351 P.2d 165 (1960), a teacher was dismissed after a hearing by the district board. The teacher by-passed the route of appeal to superior court, and petitioned the Supreme Court for a writ of certiorari for review of the board's decision. The Supreme Court, per Justice Phelps, granted the writ for the reason that the board's proceedings had been such a flagrant abuse of the due process rights of the teacher

that the §255 sppeal was not a plain, speedy and adequate remedy. That section, it was noted, prohibited the superior court from superceding the board's decision until the determination of the appeal. Phelps called attention to the injury that would be suffered by loss of income to the petitioner during the time of the appeal.

Phelps was not specific, however, about the amount of time that was saved by certiorari as opposed to review in the superior court, especially in light of the requirement of §15-255 (B) that the appeal be decided between the 20th and 40th days after filing. Justice Udall dissented, saying that the superior court remedy appeared adequate. He argued that the decision of the majority must be based either on an assumption that the superior court would not comply with the time limitations in §15-255, or else that the lower court would decide the appeal wrongly, (Udall agreed with the majority that the dismissal proceeding was clearly unlawful) making the petitioner wait out another appeal. Udall argued that for the Supreme Court to act on either of these assumptions would be a violation of its own rules and precedents.

B. Scope of Review

Arizona courts rarely disturb the decisions of public school officials, a policy which has been variously described as "deference,"[11] "laissez-faire,"[12] "not mixing in,"[13] and upholding decisions not made in "bad faith."[14] The general administrative law standard relied on is that a reviewing court may only reverse an agency action if it finds that the decision was "illegal, arbitrary, capricious or involved an abuse of discretion."[15] As regards schools, in particular, there is much language in the cases to the effect

that school officials must have a broad range of discretion if they are to properly carry out the difficult task of managing an education system.

An official has not abused his discretion if there is room for two opinions, and the trial court disagrees with the one he has chosen. In a recent cases involving expulsion of a student, the Court of Appeals elaborated on this test:

> "The terms 'arbitrary, capricious and unreasonable conduct' so as to constitute a manifest abuse of discretion calling for judicial intervention means unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Tucson Public Schools, Dist. No. 1 of Pima Co. v. Green, 17 Ariz. App. 91, 495 P.2d 861 (1972). [emphasis added]

The quoted passage comes close to stating a good faith standard of review. Although some logic must support the administrative decision, the petitioner has the burden of proving an abuse of discretion, so it is initially presumed that the decision is supported by logic. 495 P.2d at 863.

If a trial court cannot find that a decision as a whole is unlawful, then it has no authority to modify the agency's order. In Green, supra, the trial court modified the school board's decree of permanent expulsion, to allow the student to return to school after several months of exclusion. The Court of Appeals held that this was error.

> "The transcript [shows that the trial court] merely disagreed as to the propriety of permanent expulsion vis a vis limited expulsion. We believe that modification of the school board's order constituted a substitution of the court's judgment for that of the board's in a matter entrusted to the latter body's discretion. ." 495 P.2d at 864.

When the role of the court on review is as limited as in Arizona school cases, the distinction between the threshold question, what actions

are subject to judicial review, and the later question, what is the scope of review, can be academic, since plaintiffs almost always lose. Actions of school officials are presumed so strongly to be lawful, as to virtually eliminate many of the supposed benefits of review for an aggrieved party.

Two prerogatives of school boards which are not subject to judicial review are a) reassignment of teacher and b) the issuance of a warning to a teacher (without notice) that he is on probation and that if his performance does not improve his dismissal will be recommended. That is, they are unreviewable so long as they do not become part of a "dismissal" covered by the Tenure Act. Williams, supra.

The reviewing court usually hears no new evidence if there was a stenographically recorded administrative hearing. However, the Teacher Tenure Act (A.R.S. § 15-255) does provide for trial de novo in superior court. The court weighs all of the evidence presented and treats the matter like any other civil case. Tucson School Dist. No. 1 of Pima County v. Soder, 7 Ariz. App. 244, 437 P.2d 996 (1968) In certain circumstances, one can obtain a trial de novo under the JRA:

> "No new or additional evidence . . . shall be heard by the court, except in the event of a trial de novo or in cases where in the discretion of the court justice demands the admission of such evidence.
> B. The trial shall be de novo if trial de novo is demanded in the complaint or answer of a defendant other than the agency and if no hearing was held by the agency or the proceedings before the agency were not stenographically reported so that a transcript might be made. . . ." A.R.S. § 12-910 [emphasis added].

The trial court is given additional discretion for developing the record under § 12-911:

> "A. The superior court may: . . .
> 6. Specify questions or matters requiring further hearing or proceedings and give other proper instructions.

> 7. When a hearing has been held by the agency, remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it appears that such action is just."

When the Supreme Court reviews superior court decisions in §12-901 actions, it inquires whether the record contains evidence of a "substantial" nature to support the lower court's judgment. Schade v. Arizona, supra; Welsch v. Arizona State Board of Accountancy, Ariz. App. 432, 484 P.2d 201 (1971).

C. Standing

Both Arizona statutory law and case law put relatively narrow limits on the class of persons eligible to obtain judicial review in cases that are otherwise justiciable.

The JRA does not contain a general section analogous to 5 U.S.C.A. § 702, which gives statutory standing to persons adversely aggrieved or affected by agency action within the meaning of a relevant statute. A.R.S. §12-904 states that "An action to review a final administrative decision shall be commenced. . .," without saying who may commence it. It says that the filing period commences from service of a copy of the decision upon "the party affected." And A.R.S. §12-902 states:

> "Unless review is sought . . . within the time and in the manner provided in this article, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such decision." [emphasis added]

So much is left unsaid that it is almost entirely up to the courts to determine who had standing under the JRA. The Court of Appeals, in Roer v. Superior Court, 4 Ariz. App. 46, 417 P.2d 559 (1966), opted for a very restrictive interpretation. Persons who were affected by a decision of the

State Department of Health to approve an application for a sewer system, but who were not parties to the application proceeding, filed suit for judicial review under the JRA. The court held that only persons who had appeared before the department in relation to the application (prior to the decision) had standing to appeal to the courts. The court specifically rejected the conclusion of a law review article, which stated that Arizona did and should have a liberal view of standing, and it stressed that a party seeking judicial review must stand on a "positive enactment of law." As mentioned earlier, the Roer court did not say whether the parties, lacking a remedy under the JRA, could qualify for a writ of mandamus.

Arizona courts have taken a dim view of suits by "private attorney generals." In Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939), several citizens claimed that an election held in connection with the annexation of territory to the city was unlawfully conducted. The court stated that the situation presented was one in which the only party which could be aggrieved was the state.

> "[The state] may condone or overlook, for the public good, any irregularities or errors of its agents [in this case city officials]. . . " 95 P.2d at 427.

In other words, the state may let sleeping dogs lie. Interestingly, the plaintiffs did have standing to bring a declaratory action, claiming that the annexation statute was unconstitutional. The court tried to distinguish the two actions by saying that the first one was to "determine the existence of controverted facts", whereas the latter was "to construe the meaning of a law." 94 P.2d at 427. The distinction is difficult to comprehend. A more plausible argument might be made by applying the formula stated many

years later by the United States Supreme Court in Barlow v. Collins, 397 U.S. 159 (1970). That is, the Arizona court seemed to be saying that the plaintiffs made allegations which placed their interests within the zone intended to be protected by the constitutional provision they claimed was violated, but their interests were not intended to be protected by the relevant sections of the annexation statute. The statute was intended to protect the plaintiffs' interests only indirectly, by protecting the interests of the state government.

Taxpayers/electors were allowed to press a claim that a bond election being held by a board of school trustees and a board of supervisors violated constitutional limitations on indebtedness, in Morgan v. Maricopa County Board of Supervisors, 67 Ariz. 133, 192 P.2d 236 (1948). The court stated that standing was based on the plaintiff's property interests. It noted the nexus between their pecuniary interests as taxpayers and the apparent intent of the indebtedness limit to protect pecuniary interests. There is no indication in the opinion that plaintiffs could have obtained standing solely in the capacity of being citizens, or parents of children in the public schools. Taxpayer standing was also allowed in Secrist v. Diedrich, 6 Ariz. App. 102, 430 P.2d 448 (1967). But there, too, there was a nexus of pecuniary interests -- the claim was based on a competitive bidding statute that was obviously intended to prevent wasteful pruchasing practices.

Standing to intervene in a suit that has already been commenced can be an important right. In Mitchell v. City of Nogales, 83 Ariz. 328, 320 P.2d 955 (1958), the city attorney sued city officials on behalf of a taxpayer (the manager of a utility) to enjoin payment of money under a

contract for surveying the city's gas and electric requirements. Under statute, the taxpayer originally could choose between bringing suit with a private attorney, or asking the city attorney to bring the action. Here, he chose the latter. He had second thoughts, however, and sought to intervene. The court noted that the intervention statute should be construed liberally to obtain justice, yet denied the taxpayer's motion.

The opinion stressed that the taxpayer was already adequately represented in the action. Just because the city's law department was both prosecuting and defending the case, it could not be assumed that the prosecution was not vigorous. Also, the city attorney had amended his complaint to include every issue of fact and law pressed by the taxpayer in his intervenor's complaint, and it was possible for the taxpayer's attorney to act as amicus curiae in the proceedings. Furthermore the taxpayer could make a new motion to intervene or attack the judgment in the future if he could present evidence that the city attorney's representation was a sham.

In Saunders v. Superior Court, 109 Ariz. 424, 510 P.2d 740 (1973), private parties were permitted to intervene in a case in which a city was suing the state to declare a statutory retirement system unconstitutional. The intervenors were firemen, and police and fire associations (whose members were affected by the retirement law). Mitchell was distinguished on two grounds:

1) The intervenors were not adequately represented, because their interests were in some respects adverse to the city's.

2) In Mitchell there was a statute requiring the city attorney to prosecute if requested by the taxpayer; to give effect to the purposes of that law the courts should try to let him prosecute without interference or unwanted assistance.

Conclusion

The Arizonan who calls upon a state court to overrule a school official's decision faces an unusually difficult array of obstacles. First, he may lack standing either generally, under the state's narrow standing-justiciability doctrine, or specifically, because of a strict construction of the statute he relies upon for statutory standing.

Second, he must show that the decision being attacked is reviewable. Unless he makes a clear showing that his constitutional rights have been violated, or that a statute has been flagrantly disregarded, the basis for reviewability usually must be found in the JRA. This act, however, has been construed to apply to a restrictively defined class of "decisions," and the right of review is lost if not exercised within thirty-five days of the challenged decision.

It is particularly hard to know what posture to take in trying to obtain review of a policy. In Harper, the court adjudicated a declaratory judgment complaint challending a Regents policy, but indicated that in the future that policy could only properly be challenged incident to an appeal of a case in which the policy has been applied. In Jones, on the other hand, an agency failed to respond (as promised) to an individual complaint, and then promulgated a rule effectively denying the petition. The court would not allow the plaintiff to characterize the rule-making as a decision on his petition, and would not review the action under the JRA. Would the court have heard the case if it had been pleaded as a declaratory judgment action?

Especially difficult pleading problems await persons who become aggrieved by decisions based on applications of rules in the State Board of Education Policy Book. The document has such a range of statements --

from philosophical to detailed -- that one will not always know whether he is dealing with a "rule" or a "decision." Apparently, the Board intended to characterize as many as possible of its pronouncements therein as decisions, so that they would only be reviewable under the JRA, and then only for thirty-five days after filing with the Secretary of State. That is a questionable strategy. Much of the book contains rules that will be subject to challenge by declaratory judgment actions at any time there are real controversies involving them. In addition, specific decisions based on the book will be appealable under the JRA by proper parties. However, the Jones case suggests ways that officials might be able to respond to the petitions and avoid the applicability of the JRA (e.g. by ignoring petitions, which is legally if not practically possible in almost all cases, since there is no statutorily created administrative review procedure; by basing present decisions on factual determinations made in earlier decisions that are no longer subject to review.)

It is hard to understand the rationale behind the confusing decisions and the seemingly artificial distinctions in the Arizona cases. Admittedly, Arizona's judicial review act is much less liberal than many of its federal and state counterparts, which indicates that the Arizona legislature wanted judicial review of administrative action to be infrequent. The courts, however, seem to have gone further than this intent requires in its denying of petitions for review, especially when one considers that the same legislature passed the Declaratory Judgment Act.

Mandamus and special actions are available in special circumstances, and mandamus has become the customary action for challenging student expulsion and suspensions. The Teacher Tenure Act provides the only statutory review procedure in the education code.

Third, if one does obtain court review, one has to convince the court that there was an egregious abuse of discretion; otherwise the court -- paying deference to school officials -- will uphold the administrative action.

The Arizona litigant is spared one problem often facing his counterparts elsewhere. Because there are few regularly established administrative remedies in the public school system, he rarely need exhaust such remedies nor need he convince a court that he should be excused from exhausting them.

V. Local Districts

The statutes and cases which deal with the prerogatives of district level actions are few and unconclusive. Most of them have already been examined. The first part of this section organizes these authorities according to how they bear on the legal prerogatives of seven foci of authority -- boards of trustees, superintendents and principals, teachers, dealers' associations, parents, students, and citizens/taxpayers. We devote the second part of this section to case studies of two major curriculum disputes. In one situation, educators, parents, and students tried to find ways to avoid implementation in an indoctrinatory form (as they saw it) of a new statute requiring instruction in the "benefits of the free enterprise system." In the other, a group of parents, backed by a newspaper and the State Superintendent, tried to prevent a Phoenix school district from adding a social studies course entitled, Man: A Course of Study.

The studies will address these questions:

1) How did the actors perceive their de jure and de facto control over curriculum?

2) How successful were their attempts to exercise control?

First Part: Foci of Authority

A. Boards of trustees

Considering how hemmed in the districts seem to be because of the power of state agencies to prescribe courses and textbooks, it is surprising to discover substantial institutional autonomy. To begin with, Article 11, sec. 2 of the Arizona Constitution provides that the general supervision of the public schools will rest with local governing boards. The elected trustees are more than mere agents of the state board.

Secondly, the districts are almost entirely free of control by municipal corporations. The boundaries of common school and high school districts may overlap each other, and may cross municipal borders. County superintendents and county supervisors work out the resulting administrative conflicts. It is the supervisors, not municipal officials, who handle the local school levies, and their duties are ministerial. They must assess property in amounts necessary to fulfill the budget submitted by the trustees unless:

a) Some of the expenditures listed on the budget are unlawful,

b) The levy would have to exceed thirty cents (30¢) per one hundred dollars ($100) of property.[1]

If the operational expenses budgeted for the district exceed those of the previous year by more than a certain amount, computed by a statutory formula, then the budget must be approved by a vote of the district electors.[2] These limitations on the aggregate fiscal policy-making of the board are self-activating; there is no authority for discretionary actions by municipal, county, or state officials.

Thirdly, Arizona lacks any formal system for appealing local board decisions to state officials. In New York by comparison, one can appeal any local board action to the Commissioner. He has authority not only to overturn unlawful decisions, but also to substitute his policy judgment for that of local officials (absent a specific statutory provision to the contrary).[3]

This is not to say that Arizona trustees have, overall, more control over curriculum than New York boards -- the latter, for example, choose textbooks independent of state guidelines. The point is that Arizona legislature dealt out control over various aspects of the public schools

to state and local entities, sending them more or less on their separate ways.

There is no general theory of inter-organizational relations. If a party to a state-local dispute wants it adjudicated, he goes to court. In fact, there are few reported cases. In none of them, however, is a question ever raised about the standing of a local board to sue.[4]

By what means may state officials challenge or sanction local district actions? Superintendent of Public Instruction Sarah Folsom posed the following question to the Attorney General, in 1969:

> "If, after a thorough investigation [by the Department], a school district is found to have serious deficiencies in the curriculum, school plant, equipment, teaching, supplies, etc., does the State Superintendent . . . or the State Board . . . have the authority to close the school or schools within such district?"

The answer was "NO." There was no statute clearly authorizing any state official power to close down a local school. A.R.S. §§102 (¶14), and 121, vested <u>general</u> supervisory powers in the Board and in the Superintendent, but these provisions were not strong or focused enough to override A.R.S. § 15-442, which, in the Attorney General's words,

> "vests in [the local boards] complete administrative control and management of the district . . ."

It was pointed out that the following other options were open to state officials: a) After a hearing (with notice) on the alleged violations, to cut off state aid, b) To petition the Attorney General for a writ of mandamus against local officials, and c) To file criminal complaints under A.R.S. §38-443, if the facts warranted it. A.G. Op. 96-4-L (1969).

As they relate to local board autonomy, state education codes can usually be classified as "permissive" or as "restrictive." In California, for example, a board is presumed powerless to act on a matter unless there

is statutory authorization. This presumption is one reason why California's code is excruciatingly detailed. Enumerated powers give peace of mind not only to school officials, but also to their suppliers, who do not want to risk bad debts resulting from public contracts voided on grounds of ultra vires. Californians recently amended their constitution to enable the legislature to reverse the presumption. The legislature can now enact a blanket authorization pursuant to which boards could take any action not inconsistent with state law and state board policy.[5]

Massachusetts is at the other extreme -- permissive. For centuries, school committees have dominated the public education system. Their powers can only be derogated by specific statutory enactments (or exercise of constitutional rights). Such laws can generate substantial political fallout.[6]

The permissive/restrictive distinction can be murky. As a practical matter, an education code cannot anticipate every action which it will reasonably be necessary for a district to undertake in the course of fulfilling its statutory duties and exercising its lawful discretion. Inevitably, some powers will be implied from the express grants of authority. In addition, general enabling statutes can be seedbeds for bountiful harvests of implied powers. Thus, a jurisdiction which ascribes to a restrictive theory can, through application of an implied powers doctrine, allocate as much actual authority to the local boards as one might find in a -- formally -- permissive state.

If Arizona has any presumption, it is a restrictive one. But restrictive not only as to local boards, but also as to the state agencies. (Because of the absence of any statutory statement, this result follows from the form of reasoning practiced in the state courts--devout legal positivism.)

In Board of Education, Tucson High School District No. 1 v. Williams, 1 Ariz. App. 389, 403 P. 2d 324 (19), the Court of Appeals admonished the Superintendent of Public Instruction and the Arizona Board of Education from "mixing in" at the local level, i.e. directing administrative affairs. (A school employee claimed that his demotion from guidance counselor to classroom teacher was unlawful.) The Arizona Supreme Court, in Harkins v. School District No. 4, Maricopa County, 79 Ariz. 287, 288 P.2d 777 (1955), struck down as ultra vires, a state board policy. The Board said it would not give state aid to districts for pupils who had not reached their sixth birthday by December 31 of a school year. The court held that the statute requiring public schooling to be available for children between six and twenty-one years of age implied the authority of boards to admit younger children, and to receive state aid on the same basis as for other children.

On the other side of the ledger are decisions which apply this doctrine:

> "School boards have only the authority granted by statute which must be exercised in the mode and within the limits permitted by the statute." School District No. 69 of Maricopa County v. Altherr, 10 Ariz. App. 333, 458, P.2d 537, 542 (1969).

The Court of Appeals declined to find an implied board power to hire private counsel, in School District No. 1 of Pima County v. Lohr, 17 Ariz. App. 438, 498 P.2d 512 (1972). The relevant statute was amended in 1972 to permit such an arrangement with the approval of the county counsel. See also, Atty. Gen. Op. 66-23-L (1966), stating that board could not pay travel and subsistence expenses for prospective candidates for job of district superintendent. Similarly, that court held tightly to the precise wording of A.R.S. sec. 15-204, and overturned the suspension of a student by a part-time administrative assistant. Burnkrant v. Saggau, 12 Ariz. App.

310, 470 P.2d 115 (1970). The statute gave suspension power to the principal, or, in schools having no principal, to teachers. In the instant case, the school had a principal.

Judge Eubank, dissenting in Burnkrant, argued that a local board has substantial plenary powers over disciplinary problems. He traced them to: a) general supervisory powers of "governing boards" (Arizona Constitution Article 11, sec. 2), b) the designation of high school boards of education as "governing boards" (A.R.S. sec. 15-541), and c) the general rulemaking powers of these boards (A.R.S. sec. 15-441). Without reaching the question whether the administrative assistant's action was lawful, he urged that the plaintiff was required to appeal to the district before being heard in court. He invoked the exhaustion of administrative remedies doctrine--notwithstanding the absence of any formal appeal mechanism.

Notice that Eubank, while trying to give legal significance to the potential for an ad hoc appeal at the local level, does not hint that an unfavorable board decision could then be appealed to a state official. But if he can insist on a local appeal, he probably also could bootstrap a state appeal, using sec. 15-441, which provides that the board's rules cannot be inconsistent with laws or rules prescribed by the state board of education. Thus, if there is a state discipline policy, Eubank's approach would probably compel the student to perfect an administrative appeal to some state official before he could be heard in court. One can certainly question the fairness of a doctrine which makes a student guess what administrative appeal mechanisms he must call into existence before he can litigate.

The actual extent of board plenary powers to deal with discipline

problems is unclear. The courts have stated in strong terms the rights of students to hearings with due process guarantees prior to suspension for any substantial period of time, but they have not yet held that a particular hearing failed to meet that standard. See Carpenteiro v. Tucson School District No. 1 of Pima County, 18 Ariz. App. 283, 501 P.2d 459 (1972); Kelly v. Martin, 16 Ariz. App. 7, 490 P.2d 836 (1971); Pendley v. Mingus Union H.S. Dist, No. 4, 109 Ariz. 18, 504 P.2d 919 (1972); Goss v. Lopez, 43 .W. 4181 (1975).

In short, the response of Arizona courts to claims of implied powers belonging to state agencies or local boards is--"A curse on both your houses." This reluctance to parcel out authority leaves us with little positive guidance. But at least it indicates that there is no basis for a doctrine of local pre-emption by state board policies. (There are no decisions directly on point.) The recent work of the State Board in writing the Policy Book (supra at 153) may soon test this proposition. It is worth recalling that, despite the considerable powers of the Board to prescribe courses and textbooks, the Arizona Supreme Court and the Attorney General have treated the statutory phrase "other special subjects" as an independent source of local board authority to hire physical education instructors.[7] There is one case in which a pre-emption doctrine is specifically invoked to void a purported exercise of board power, but it was a statute, (the compulsory attendance law) not a policy, which ousted the board of authority. Local officials required that every summer school student pay a five dollar deposit that would be forfeited if he were absent without good cause for more than three days. The court held that the rule was pre-empted by the statutory scheme furthering free education, and by the compulsory attendance law. In re Arizona Southwest Bank's Estate, 41

Arizona 507, 19 P.2d 1063 (1933); Ellery v. Board of Education of Tucson High School District, 41 Ariz. 507, 19 P.2d 1063 (1933).

Finally, a board versus electors conflict has been adjudicated. It was held that although a local board could not sell a school site without the approval of the electorate, once that approval was secured it could not be revoked by a second referendum. The court mentioned the practical need for the board to have enough continuing authority to plan for the future. Garrett v. Tubac-Amado School District No. 5, 9 Ariz. App. 331, 451 P. 2d 909 (1960).

General authority of trustees summarized: Arizona education law has judicially developed a restrictive presumption. Because the presumption is applied just as stringently against state (administrative) as against local claims of authority, it has not spawned a doctrine of pre-emption of local power by state policy making. When local rules are involved, however, such a doctrine could be rooted in A.R.S. sec. 15-441:

> "([the local board] shall prescribe and enforce rules not inconsistent with law or rules prescribed by the state board of education." [emphasis added)

As one would expect even in a restrictive state, the Arizona courts have, in some instances, found implied local board powers. But there is no discernable pattern of decision.

* * * *

The preceding analysis showed how theories of local board power can differ from state to state. What follows is six summaries of substantive areas of local board authority: selection of courses, methods of instruction, constraints on innovation, assignment of pupils, neutrality and indoctrination, acculturation.

1. Selection of courses

(a) The interaction of the Board's authority to prescribe courses and select textbooks (A.R.S. 15-201) with the district's general administrative powers (A.R.S. §15-442), and the latter's authority to hire teachers of "other special subjects" (A.R.S. §15-448; Op. Atty. Gen. 61-16; Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056 [19]), is described at length in section III(C), supra at 72-77.

(b) The proposition that the district, in structuring its curriculum, is subject to a First Amendment "fairness doctrine", is examined in section III(C), supra at 87 .

(c) The legislature has mandated instruction in state and federal constitutions, American institutions, Arizona history, alcohol and other dangerous drugs, oral and silent reading, and the free enterprise system (A.R.S. §15-1021-1025). See section II(D), supra at 50 ; and see discussions of issues raised by the free enterprise course, supra at 49, 51 , and 82 .

(d) The district may establish a variety of career education (A.R.S. §15-1199) and work experience (§15-1015[D][2]) programs, but they must conform to standards prescribed by the Board (§15-1199.01; §15-1010) as applied by the State Superintendent (§15-1199.02; §15-1012). Problems of interpretation are examined in section II(4), supra at 51 .

(e) All school districts must plan for, and, by September 1976, must provide special education services for all handicapped pupils, except for the emotionally handicapped. (A.R.S. §15-1010). The programs are subject to scrutiny by: a newly created division of special education, by the Superintendent, and by the Board.

(f) The districts may provide special educational services for

gifted and emotionally handicapped children (A.R.S. sec. 15-1015[D][3].

(g) The districts may provide special courses of bilingual instruction for common school children, subject to Board regulations as to the qualifications of participating students and teachers, and to the suitability of the facilities. (A.R.S. secs. 15-1097-1099).

(h) Miscellaneous--district option for extended school year (A.R.S. sec. 15-1137); district may not approve released time for religious instruction (Op. Atty. Gen. 59-9 [1959]).

(i) Residual authority? It is not clear to what extent the statutory schemes relating to special education, career education, and bi-lingual education pre-empt the authority of the local district to offer courses not conforming to state regulations. Because each of these schemes provides for categorical state aid to approved programs, one can argue that although a non-conforming program is ineligible for a special grant, the district may still lawfully conduct it, albeit without the special state aid.

2. Methods of instruction

(a) Assuming that state authorities have authority to describe whether a particular course must be taught, or must not be taught, the extent of state authority to prescribe how the mandated or optional subjects will be taught is in dispute. May the Board use its textbook selection powers to impose detailed instructional syllabi on classroom teachers? Or to narrow the choice of approved materials so as to practically mandate one method of, say, teaching reading? May the Board enforce a policy that history and current affairs instruction must be built around a "basic facts" rather than a "problem solving" approach? See section III, (C) and (D), supra at 66 and 96.

(b) An increased emphasis on state-wide standardized achievement testing is bound to influence teaching methods in many districts. The legislature has told the Board to develop uniform performance objectives in "reading, writing, and computational skills", and to implement an evaluation system, by June 30, 1975. This project is to be undertaken "in cooperation with all local school districts" (A.R.S. sec. 15-102, ¶25 [emphasis added]).

(c) May a district deem students as being in attendance when they are engaged in approved off-site experiences? The work experience and career education statutes give the concept legitimacy, but the issue has not to our knowledge been squarely faced in any adjudicative proceeding.

(d) Can Free Enterprise be taught as a comparative economics course? See supra at 49, 51, 82 and infra at 189, 230.

(e) Miscellaneous. Districts may "enrich" the prescribed state courses, but may not supplant them. (See section III(C)(2), supra at . A high school may not incorporate the materials from a correspondence course into its curriculum if the books are not state-approved (Op. Atty. Gen. 57-7 [1957]).

3. Constraints on Innovation

Apparently, no Arizona law has the objective of encouraging innovation by local officials. At most, there are a few statutes, like the Career Education Act, which invite localities to participate in new programs designed by the legislature or by state administrators. This section describes the kinds of obstacles that may lie in the path of a district which wants to try a new instructional approach.

Part (a) briefly discusses course content and methods of instruction. Part (b) deals with constraints on district authority to marshall resources for implementing new curriculum. After looking at decision -making about financing and physical plant, attention is focused on the using of unconventionally qualffied instructors in the face of laws relating to certification and job security.

The Arizona education code, unlike some others, lacks statutory procedures for waiver of curriculum mandates, teacher credentials, and similar standardized quality controls. On the other hand, the weak legal position of teacher and administrative organizations and their consequential lack of bargaining strength reduces the pressure on districts to contract away whatever flexibility they do have. (We are assuming a district that wants to innovate. Where that premise does not hold, or where teachers and administrators have"better" reform proposals than the district officials, strong professional organizations can be responsible for bringing about successful innovation.)

(a) The points just made about courses and methods of instruction show how limited, or at least doubtful, is district authority to develop curriculum--and those obstacles can stand in the way of both conventional and innovative course offerings. Some state legislatures have given waivers or special grants of authority to local school officials, enabling them to experiment with new programs. Such a statute might limit the

permission to projects directed at special problem areas (e.g., reading instruction in districts with far below average achievement levels); it might limit it to a certain period of time; or it might require that the local officials persuade a state school official of the merits of the program (and the official is empowered by the statute to waive otherwise conflicting code requirements or state regulations). In Arizona, however, one can point to virtually no evidence of a legislative enacted (or state administrative) policy favoring educational experimentation via local initiative. (A small crack in this wall is the recent statutory provision authorizing the Board to approve a district application to offer a course which is not on a state list. A.R.S. sec. 15- 102.18.)

(b) To implement an innovative program it is often necessary to acquire or reallocate physical, financial, or human resources. If a board of trustees wants to--(i) locate or relocate a schoolhouse, (ii) purchase or sell a schoolhouse, or build one, or (iii) issue bonds to raise money for various capital outlays, it must hold an election and secure the approval of a majority of those voting in it.[8]

As for financial resources, the trustees may not increase the district's operating budget from one year to the next beyond a percentage determined by a statutory formula unless the increase is approved in referendum. (Until 1974, the statutory figure was a flat 6%.) The impact of this provision on local purchases of textbooks and teaching aids is discussed supra, at 134 . In 1974, the Arizona Legislature passed a set of school finance reform measures, St. 1974, c. 3. The new laws preserve the local board authority to enact budgets that are kept within certain growth limitations, but they replace the 6% figure with a series of formulas which relate the acceptable rate of increase to the rate of increase

in general state school aid, to changes in district enrollment, to expected categorical aid for the district during the budget year, and to other relevant factors. The new formulas are primarily aimed at harmonizing two new (or renewed) state policies--establishing an adequate state guarantee of basic financial support for every public school classroom, and equalizing public school spending by local districts.[9]

Finally, a district's ability to innovate can depend on its freedom to manage human resources. What are its prerogatives for creating or eliminating teaching and administrative positions? for changing job descriptions? for promoting and demoting? For hiring and firing? Statutes and state administrative regulations impose limitations primarily in two areas--certification, and job security. In addition, trustees can tie their own hands by contractual agreement with employees or employee unions.

Innovation is impossible without innovators--if not the actual inventors of new programs at least persons who accept the new instructional methods and objectives and who are both technically qualified and psychologically predisposed to carry them out. A certification system can make it easier or harder to pull together an innovative staff. The key question is, "What kind of education, experience, and training, qualifies one for a certificate?" Currently, the Board sets the criteria for certification,[10] and there is no indication that the criteria encourage future candidates to explore experimental and unconventional instructional methods during their preparation for teaching. Thus it is left to the initiative of the education schools and future teachers to develop such programs. And, of course, a school district may choose to hire one certified applicant over another because of his or her training in new methods.

Can a district hire an instructor whom it believes is highly qualified to teach a particular subject, notwithstanding that person's lack of a state certificate? This question has arisen in connection with hiring professionals in non-teaching fields to work with students. For example, members of a theatre company could teach dramatics, or a lawyer could teach a consumer law course, or a doctor could teach a course in health careers. At the other end of the spectrum, schools have sometimes sought to hire non-professionals--even persons without college degrees--because they seemed to be unconventionally qualified. For example, if the principal of an inner city school believes that the alienation of students and parents from the school is a serious impediment to attendance, motivation, and achievement, he may seek to add to his teaching staff a neighborhood adult who may not be conventionally "qualified" to teach, but who the principal believes could perform as well as many certified teachers and could contribute in many positive ways to improving the school's learning environment. Or the principal might believe that a factor which ordinarily disqualifies a person from certification--e.g., serving a prison sentence--has in a particular case enhanced that person's ability to motivate and instruct children--and to lend special authority to his warnings against anti-social behavior.

Some state education codes have certification waiver provisions to deal with the non-teacher professional, or the unconventionally qualified instructor. Arizona does not. Rather, the district is faced with A.R.S.-443(B):

> "No teacher shall be employed who has not received a certificate for teaching, granted by the proper authorities."

4. Assignment of Pupils.

(a) A.R.S. sec. 15-442(B)(3) authorizes the local district to devise pupil groupings, thereby implying the power to assign individual children to the groups.

"The board may:

* * *

3. Make such segregation of groups of pupils as it deems advisable."

(b) The district's prerogatives, however, are limited by approximately a dozen statutory classifications of students. These are described in section III(C), where they are subdivided into those applying to "normal" pupils; those applying to children disadvantaged by nature, accident, or past neglect; and those which are self-classifications (e.g. students taught at home by parents.)

The Arizona legislature has shown particular concern about both the standards and the procedures for labeling children "normal" or "special." Definitions of the main categories of children with special needs appear in A.R.S. sec. 15-1011. Mandatory placement and evaluation procedures are laid out in sec. 15-1013. They include evaluation by at least one professional specialist, and consultation with--the principal: an administrator of the program under consideration; a teacher; a professional advisor; and a parent or guardian. At the end of the road,

> "no child shall be placed or retained in a special education program without the approval of his parent or guardian." sec. 15-1013(E).

What limits are there on a local board's power to classify and assign "normal" children? As the above discussion shows, there are statutory obstacles to a board's trying to classify a normal child as a special child.

The abuse which led to the enactment of laws of this sort in many states was the cavalier labeling of non-cooperating or culturally different children as emotionally or intellectually deviant, and diverting them from regular classrooms into special placements where instructional services were ill-suited to their real needs and abilities. The legislature hasn't spoken, however, to the question of tracking and otherwise grouping the "normal" students.

But the issue has been raised in two suits against the State Department of Education. In Pima-Santa Cruz Headstart v. Arizona Board of Education, Civ. 71-126, USDC, Tucson, Filed 10/5/71, plaintiffs claimed that making a score on a reading test a pre-condition to promotion violated the rights under the equal protection clause of children who were left back. In this group of children was a disproportionate number of children from non-mainstream cultures and from non-English-speaking families (e.g. Hispanic and Indian children). The case apparently was settled on the basis of a directive from the State Superintendent. He "clarified" the state reading policy, stating that its purpose was to encourage children to develop reading standards, not to make promotion impossible for students scoring below the state-suggested levels. (Department of Education files).

In the other case, Guadeloupe Organization Inc. v. Tempe Elementary Sch. Dis / Civ. 71-435, U.S.D.C., Phoenix, Stipulation dated 9/9/71, plaintiffs claimed that intelligence tests which underrated the intelligence of non-native English speakers were being used to assign students to special classes, in violation of the rights of non-native English speakers wrongfully labelled "retarded." This case was also settled."[8]

(c) Suspension, expulsion, and use of compulsory attendance laws to take children out of private placements they or their parents have chosen, are all forms of pupil assignment. On suspension/expulsion, see

section V(F) infra, at 219 ; compulsory attendance, see section V.

(d) In some situations, students may have a right to selectively "opt out" of ordinarily required courses. Obviously, the exercise of such a right negates a pupil assignment designated by local or state officials, or the legislature. Situations in which opting out may be available as a judicial remedy are examined above, section III(C)(1), supra at

5. Neutrality and Indoctrination.

The corresponding section of the chapter on New York develops these concepts in its analysis of legislative, administrative, and judicial action in that state. One rule that seemed to emerge from New York was that the schools may take sides on "fundamental issues of political philosophy", but not on "sub-issues," such as socialized medicine or foreign policy. (Chapter 4 page 112. Also, the point was made earlier in that section (page 105) that instruction can take sides on an issue, without being indoctrination. For example, a course of study ending with the conclusion that it is necessary to put national patriotism ahead of internationalism, could have presented contrary evidence and arguments, and could have (at least) implied that a contrary belief--though it may be wrong--would not be irrational.

(a) The Arizona Legislature has mandated a high school course in the "essentials and benefits of the free enterprise system." The course, as described in the statute (A.R.S. sec. 15-1025), is definitely one-sided, thereby giving rise to these questions:

(i) Does it take sides on a subject in which non-neutrality is permitted?

(ii) Even if the course passes the neutrality test, does it

fail the indoctrination test?

The answer to the first question depends on how "free enterprise" is interpreted. Colloquially, it approximately refers to the American mixed economy, where private ownership and private market decisions are the preferred means of economic activity, but where government regulation is seen as necessary to achieve certain goals of efficiency, justice, and allocation. This viewpoint is both so general, (at one end it overlaps with some theories of socialism) and so widely accepted, that an instructor's merely taking sides in favor of it could not fall to legal attack. On the other hand, if free enterprise is taken to mean strict laissez-faire economic system which does not and has not ever existed in the United States,[12] one with virtually no government role in economic decision-making, then it would probably be impermissible under New York law. But if the laissez faire course is mandated by the Arizona Legislature, it could only be challenged on constitutional grounds (state or federal). The sponsors of the free enterprise law, and Superintendent Shoftall, had this latter interpretation in mind. See infra at

Assuming that it is otherwise lawful to teach a course whose content extolls free enterprise (either definition) over other economic systems, certain methods of presenting that point of view may constitute indoctrination (as defined in the New York chapter). For example, the law's directive to teach the benefits of free enterprise may lead to a course in which no disadvantages of free enterprise are mentioned, only the problems of alternative systems are studied, and in which it is taught that there is no rational position one can take in support of another economic theory. There is, as yet, no Arizona authority for striking down such a course as "indoctrination." One would have to turn to the

state or federal constitution, to authority in other jurisdictions, or to the argument that allowing an indoctrinatory form instruction was not a purpose of the lawmakers in passing the statute.

(b) Arizona has several statutes which, in effect, require the public schools to take a position in favor of patriotism and against communism. A.R.S. secs. 15-1021 (mandated courses in history, civics, etc.); secs. 15-231-2 (loyalty oaths); sec. 15-233 (civics courses required of instructors); sec. 15-1031 (observance of patriotic holidays).

(c) After disputes about instruction in sex education and biology (evolution), state actors have tried to find neutral ground. Sex education is permitted, but not mandatory. As for evolution-related courses, the Basic Goals Commission in Science recommended:

> "The students should have access to the various scientific interpretations of even the most controversial theories of Science. . . Fact and theory should be kept separate. Dogmatism should be avoided . . ." Course of study: Criteria for Textbook Selection, p. 18. See supra, at

6. Acculturation

(a) The Arizona authorities in this area are few, and they do not add any new strands to the analysis of acculturation which is found in the chapter on New York State. The relevant points can be noted briefly, except for the more complicated subject of Indiana and bilingual education, which are discussed in subsection (b).

(1) Acculturation by coercive rules.

> "The board of trustees shall prescribe and enforce rules for the government of the schools, not inconsistent with law or rules prescribed by the state board of education." A.R.S. sec. 15-441(A) [emphasis added].

Complementing this general rule-making power is the sanction of expulsion "for misconduct." A.R.S. sec. 15-442 (B)(1). (See also sec. 15-305 (B),

infra at). Boards frequently pass rules that define sex roles (short hair for men; no women in auto mechanics); that sanction certain marital or sexual decisions (married students expelled; pregnant women suspended); or that enforce conventional norms of appearance (dress codes). Most, if not all, of the adjudication in this area has involved male grooming regulations. One can mount a non-constitutional attack on such a rule by finding that it is beyond the rule-making authority of the board because not reasonably related to "the government of the schools." The Arizona Supreme Court paid lip service to this limitation in Pendley v. Mingus Union High School No. 4 of Yavapai County, 109 Ariz. 18, 504 P. 2d 919 (1972), but in his dissenting opinion Justice Holohan shows that the factual record on which the majority upheld the regulation, and its application, was so frail that the holding virtually reduced the statutory limitation (and the constitutional rights he thought were violated) to a nullity. See section I(C), supra at 31 , (Civil Rights); section IV(B), supra at161 (Scope of Judicial Review); and section V(F), infra at219 (Students).

(2) Acculturation by instruction

As a practical matter, local school officials are in a position to impart social/cultural values of their choosing, through variations of tone and emphasis; and by their selection of lectures, activities, and (supplementary) materials. As a legal matter, it would be difficult if not impossible to challenge the local practice, unless it can be shown to be partisan; sectarian; intentionally disparaging of a racial, ethnic or religious group; or contrary to state law or policy. (A.R.S. secs. 15- 203, 15-442(a)(5); Op. Atty. Gen. 72-27-L (July 28,1972).

The State Board of Education Textbook Policy requires that textbooks "mandated to be chosen by the State Board" (which account for a very large segment of common school teaching materials, see section III (C and D)) must support certain values--

> "Textbook Content shall not interfere with the school's legal responsibility to teach citizenship and promote patriotism.... Violence shall be treated in the context of cause and consequence: it shall not appear for reasons of unwholesome excitement or sensationalism. Coarse, vulgar, profane expressions or terms shall be avoided in all textbook content."

And they must be neutral as to other values:

> "Textbooks ... shall be objective in content; reflect a minimum of bias in interpretations; and shall not reflect adversely upon persons because of their race, color, creed, national origin, ancestry, sex or occupation." Policy Book, Rule 4(b)(x), at 143.

The rules, on their face, do not seem to pose much of a threat to local prerogatives. But the process of interpretation and application is entirely outside control of the local boards--as a part of state textbook selection, and will therefore limit the ability of boards to obtain books which in its opinion satisfies these criteria, but about which some textbook commission or State Board member had a different idea. The local officials are not without any recourse, however, since the policy

> "does not apply to library books or any other books chosen by the school districts under their statutory powers."

Just what that "statutory power" consists of, is the very confusing issue examined in section III(C and D), supra at 66, 96.

(b) Treatment of ethnic and cultural minorities. One in every four public school students in Arizona is either a Mexican-American or an Indian.[13] This fact would be a revelation to anyone whose only knowledge about Arizona came from reading the Education Code. There is no evidence

of a state legislative policy of curricular adaptation to meet the need of school children coming from Indian cultures. The legislature merely has authorized the State Board to enter into contracts with the federal government to provide services for Indian students A.R.S. sec. 15-1161. A contract may provide that payments be made directly to individual school districts. Op. Atty. Gen. 57-127 (1957). Thus, the Board may turn itself into a conduit, leaving it to the local districts to negotiate with the Bureau of Indian Affairs about the content of educational programs financed with the federal money, but it may also decide to closely scrutinize any potential grants and overrule local plans. The Bureau of Indian Affairs has developed curriculum materials which are designed to enable Indian children to learn about their cultures and to respect them, and to help them understand the differences between their cultural heritage and the values of mainstream American society. R.Ross, "Cultural Integrity and American Indian Education," 11 Arizona L. Rev. 641, 669-672 (1969).

In 1969, the Legislature finally passed an act which encouraged and aided districts in providing language instruction for non-English speaking children. A district may,

> "Provide a special course of bilingual instruction for common school pupils, not to exceed an accumulated period of four years per pupil. . . " A.R.S. § 15-1098(A)(1).

A district providing such a program is eligible for a special state grant not exceeding $50.00, for each pupil participating in said program. A.R.S. §§15-1099, 1212.

What makes a program "bilingual"? Education scholars use the term to refer to a model in which classes are conducted in a language other than English to the extent necessary for pupils to comprehend the subject matter. As students master English, they make a transition into regular, English-only classes. The bilingual approach can be contrasted with another model, English as a second language (ESL). In an ESL program, non-English speaking children attend classes designed to teach them English, but neither this special course nor their other courses are taught in their native tongue. Other variations in these models will be discussed below, when the explicit and implicit cultural components of bilingual instruction are examined.[14]

Arizona's bilingual act appears, on balance, to express a legislative purpose to encourage programs closer

to the bilingual model than to the ESL approach. But this conclusion is not beyond challenge. The original act had the following statement of intent:

> "The purpose of this act is to provide a special program for teaching the use and understanding of the English language . . . ." Laws 1969, c. 95, §1.

Moreover, the act was then entitled, "Special English Training", and not until 1973 was the label expanded to: "Special English Training and Bilingual Instruction." Laws 1973, c. 169, §4.

In 1972, the legislature re-articulated its objectives in terms that would include the academic profession's notion of bilingual instruction:

> "The purpose of this act is to extend special courses of instruction for school children who are having difficulty in speaking or understanding the English language." Laws 1972,c.124, §1.

Presumably, "courses of instruction" includes not only teaching children English, but also teaching them science, math, and other basic subjects, using whatever "special" means are appropriate for the comprehension of the instruction by non-English speakers. One can make also a strong argument that the bilingual model was the legislature's choice. A.R.S. § 15-1098(A), paragraph 1, grants to district boards the authority to offer "a course in bilingual instruction." The following paragraph of the section gives the boards authority to:

> "2. Provide a special course of instruction for common school children who are having difficulty in speaking or understanding the English language. This special course of instruction in the English language shall be in addition to the regular course of instruction prescribed in all school districts." [emphasis added]

Paragraph two obviously refers to ESL. Following the canon of construction that statutory language should not be construed so as to render it meaningless, the first paragraph's reference to "bilingual instruction" must be read to authorize instruction more far-reaching than ESL.

The revised title to the act, the 1973 statement of purpose, and our interpretation of the above-quoted section, all point to the conclusion that the act authorizes truly bilingual programs. This tells one little about the exact content of such programs, however. They can be cast in a variety of forms, with the distinguishing features being hotly disputed issues. In this discussion, we are particularly concerned with those features of a bilingual course which give it an express or an implied cultural message. We now turn to an examination of the potentially cultural aspects of bilingual instruction, after which we will examine the allocation of authority between state and local actors to control the content of these programs.

A bilingual course may have the effect of encouraging a child: to assimilate into mainstream society; to substantially retain his mother culture but to try adapting it to prevailing American mores; to separate himself from the

mainstream in order to practice his native culture; to revolutionize the established society in order to accommodate his cultural values. While this list does not exhaust the alternatives, it demonstrates a wide range of "lessons" not all of which are clearly recognized by many of the persons exercising authority over the programs.

For example, when Superintendent Shofstall addressed the Bilingual Bicultural Institute in Nogales, Arizona, in March 1974, he said,

> "The State Department of Education wants to lead the bilingual, bicultural parade." p. 6.

The Superintendent's speech evidenced a belief that agreement on providing some bilingual bicultural education implied substantial agreement on the content of such programs. He spoke of a collective "vision" --

> "to instruct our non-English speaking children in a manner in which they will have the opportunity, at long last, to take their places in successful mainstream living." p. 6. [emphasis added]

He also spoke about educating "happy and productive American citizens" with "pride in their mother culture," "who can communicate adequately in two languages and function happily in two cultures." pp. 2-3. There undoubtedly are many local officials and many teachers and parents who would consider that characterization to be assimilationist.

We would consider the following factors in determining to what extent a bilingual program tended to acculturate children into Anglo society:

a. Are Spanish (or Indian, or other non-English speaking) children instructed in the literature and language arts of their native tongue?

b. Are English speaking children, Anglo and non-Anglo, encouraged (or required) to take Spanish (Indian) language courses?

c. Are Spanish (Indian) children taught about Spanish (Indian) culture and history?

d. Are English-speaking children encouraged (or required) to learn about Spanish (Indian) culture and history?

e. What are the state regulations or district policies governing pupil assignment -- in particular, how strong an emphasis is there on transferring a child into English-speaking classes as soon as possible? (The Arizona bilingual act puts a four year limit on a child's participation in bi-lingual classes. Presumably, even if after that time a pupil still lacks a mastery of English he will have to attend only English-speaking classes.)

f. Finally, one should attempt to make these more complex and subjective judgments:

1. Does the bicultural curriculum as a whole convey the idea that--judged abstractly--the non-Anglo culture has as much integrity and richness as the Anglo one? (Or that it is decidedly inferior or superior?)

2. Even if abstract equality is suggested, does the curriculum suggest that the child realistically can choose either :

a) to live <u>in</u> that culture, or

b) to establish for himself a way of life in the mainstream which allows him substantially to abide by the values of his mother culture? (Or is a life style based on that culture's values portrayed as colorful anachronism?)

Who has authority to determine the characteristics of bilingual bicultural programs? The answer is not to be found on the face of the bilingual act. Consequently, it is necessary first to assess the precedent authority of local districts to maintain bilingual bicultural courses, and then to evaluate the possible changes wrought by the new law.

At its inception, the Arizona Education Code contained this provision, adopted from California law:

> "All schools shall be conducted in the English language." Laws 1912, c. 77, §73; A.R.S. §15-202.

It remained intact until amended by the bilingual act in 1969. However, even before 1969, local districts could have made a strong claim for an authority to offer bilingual education, a claim buttressed by two Attorney General opinions. In 1956, the Attorney General delivered an opinion stating that students could not be subjected to censorship and punishment under Arizona law for engaging

in "purely social" conversation in a foreign language in public school. Atty Gen. Op. 56-60.(1956). He found that to construe A.R.S. §15-202 otherwise would render it unconstitutional under the doctrine of Fourteenth Amendment personal liberty enunciated in Meyer v. Nebraska, 262 U.S. 390(1923). He implied, however, that such conversation could be prohibited to the extent that the school made a strong showing that it

> "disrupt[ed] or impede[d] the orderly conduct and government of the school, or endanger[ed] the safety of the nation."

In 1961, the Attorney General was asked whether a local district had authority to employ teachers to instruct children in foreign languages, under A.R.S. §15-448. (This is the "other special subjects" provision which is cited throughout this chapter, and which was interpreted by the Arizona Supreme Court, in Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056(1927), to authorize the employ of physical education teachers.) The Attorney General decided that the statute served to delegate to the boards the power to provide foreign language instruction. There was no mention in the opinion of A.R.S. §15-202.

These two opinions are not conclusive on the question of bilingual courses. The 1956 opinion only covered non-academic use of foreign languages. The 1961 opinion, although it expressly covered instruction in a foreign language, involved the authority of a district to use said

language incident to the language itself being a subject of instruction. In a bilingual program, on the other hand, the foreign language is used as the medium of instruction. Notwithstanding this possible distinction, we believe that if the bilingual question had been raised prior to 1969, it would have been decided in favor of local district authority.

What effect did the 1969 act have on local authority? The enabling provision for the local boards, A.R.S. 15-1098, is broad and inclusive. Thus, if there is any narrowing of local authority it must be a consequence of the grant of rule-making authority to state officials. Under A.R.S. 15-1097, the Board establishes rules and regulations pertaining to:

> "1. Testing standards and qualification requirements for students to qualify for each grade level under this article prior to and after completion of each program.
> 2. Minimum qualification for instructors to teach under this article.
> 3. That schools seeking support under this article have suitable facilities."

School districts may only operate bilingual programs after receiving certification from the Superintendent that they have complied with the Board rules.

This rulemaking authority may enable the state to make a cultural imprint on the bi-lingual program. For example, if the Board wanted to minimize the non-Anglo tone and content of the courses, it could set teacher qualifications which required fluency in English, but a

lesser mastery of the non-English language (hereinafter, Spanish will be used as an example). Thus, most "bilingual" teachers probably would be Anglos who learned Spanish in high school and college, and there might be few qualified native hispanics. (Credentialing that required fluency in Spanish but not in English would tip the balance in the opposite direction.) That rule would create difficulties for a district that wanted to hire native hispanic (or Indian) teachers for their bilingual programs, in order to coordinate them with a bicultural curriculum.

Although the pedagogical connections between bilingual and bicultural curriculum can be subtle, it at least is possible to break down the legal issues into eight components. They are:

(1) local authority/bilingual programs/pre-1969

(2) local authority/bicultural programs/pre-1969

(3) state authority/bilingual programs/post-1969

(4) state authority/bicultural programs/post-1969

(5) local authority/bilingual programs/post-1969

(6) local authority/bicultural programs/post-1969

(7) state authority/bilingual programs/pre-1969

(8) state authority/bicultural programs/pre-1969

We have already concluded that (in category 1) local districts had authority to offer bilingual programs. It also appears that (in category 2) localities could offer

bicultural programs -- that is, if physical education and foreign language instruction are "special subjects" under A.R.S. §15-448, then bicultural courses should qualify as such. Alternatively, the district, instead of offering a separate course, could include bicultural lessons within the state-adopted common school courses.

State authority (3) is derived from the bilingual act, especially the above-quoted grant of rule-making power. Assuming that the Board and Superintendent did not have nearly so broad (if any) rulemaking power before 1969 (in other words, if we assume that there was no authority in category (7)) then what new balance did the act strike between state and local officials? Since the act expressly confers authority on local districts, and nowhere expresses the idea that what on face is a grant is really a limitation, the state rulemaking power is impliedly limited by the essential role of the districts as the initiators and the primary supervisors of Arizona's bilingual education programs. Though it is difficult to draw a boundary with exactitude, there must be a point at which state regulations could become so detailed as to amount to an intrusion into that role, and they therefore would be ultra vires.

The foregoing analysis is the basis for answering the key question, to what extent may state officials control

the cultural content of bilingual bicultural programs through its regulatory powers under the act. This issue can be expected to arise in two kinds of cases. First, the Board may pass regulations that are, undeniably, reasonably related to its intended role in setting standards for bilingual programs, but the regulations have cultural overtones (e.g. the example, supra, about language competency teacher qualifications which favor Anglos or non-Anglos). It would be very difficult here to find a violation of the bilingual act.

Second, the Board may adopt rules that are not, on their face, reasonably related to its role in administering the bilingual act, and which impose an express or hidden cultural curriculum. The Board must find an alternative authority for such rulemaking. But while the Board arguably had some (category 8) authority to adopt a course of study in biculturalism (under A.R.S. §15-102, ¶¶15, 16, 17), that did not entitle it to use bilingual regulations as a means to restrict existing local board authority (category 2) to have cultural offerings. There is,then, no alternative ground on which to base the regulations.

What will ordinarily determine whether a given regulation falls into the first or second model will depend on the test applied to determine whether the rule is "reasonably related" to the legal role of the state agency as defined by the act. A conventional judicial

approach would be to fashion the test in terms of purpose and effect. The test might take one, or some combination, of these criteria to be grounds for invalidating the regulation:

a. The primary purpose of the Board in promulgating the regulation (or of the Superintendent in his manner of enforcing it) is to control the cultural content of instruction. Proof of intent ordinarily is difficult. A showing of powerful impact on cultural education might be accepted as a showing of constructive intent.

b. the absolute amount of spill-over effect on cultural content is unacceptable;

c. whether the spill-over is, in absolute amounts, high or low, it is unacceptable because it is not justified by a corresponding important interest in the bilingual program; i.e. the primary effect is upon bicultural rather than bilingual education.

Conclusion

Arizona's policy of encouraging local districts to provide special educational services for non-English speaking children cannot avoid having a cultural dimension. In addition to any explicit cultural instructional objectives, there is a hidden cultural curriculum within the structure of any bilingual program.

Though its boundaries are far from certain, there is local district authority to initiate bicultural instruction and to challenge any state actions which would impose a strong cultural imprint on state-certified bilingual programs. Before the passage of the bilingual act, districts could have offered bilingual or bicultural courses under the statutory proviso for "other special subjects," and they could have incorporated culture-related activities into state-adopted courses. The act may have restricted, to some extent, local autonomy in determining all the details of bilingual education, but the new law can hardly be read to diminish local authority over cultural curriculum. If the Board or the Superintendent, in the process of setting standards for, and certifying bilingual programs, was to seriously effect the cultural content of the curriculum, these actions could be challenged on a theory of ultra vires. Since the act does not mention cultural education, the restrictive state presumption (see supra, at) of the education code would work in favor of the local boards.

B. Superintendents and Principals

1. County school superintendents

County school superintendents are glorified clerks. If any of them are influential policy-makers, the success must result from moral authority and persuasive force -- they have no discretionary legal authority. The county superintendent meets with the state superintendent once a year; he receives a yearly report from the boards of trustees within his jurisdictions; he provides certificates for graduating eighth grade students; he calls elections; he acts as a liaison between the governing boards and the county board of supervisors on such matters as distribution of school funds and redrawing of district boundaries. There was a time when the county superintendent would hear appeals by teachers challenging discharges, but the Legislature withdrew that small realm of d in 1960. Laws 1960, Ch. 127, §61.

It might seem that an ambitious county superintendent could at least watch out for violations of the Education Code, and institute suits when he thought it desirable. But he only has standing to litigate a narrow range of actions -- those affecting his supervisorial control, his rulings, or his jurisdiction. Harris v. Hoelzen, 16 Ariz. App. 74, 491 P.2d (1971).

The office of the county superintendent is no more than a handy device for organizing transactions and communications between local governing boards and higher officials. Because there is so much territorial variety and confusion in the boundaries of common school districts, high school districts, and municipal districts municipalities, the county focus is a logical unit choice.

2. The district superintendent.

The board of trustees of a common or high school district may employ a superintendent for a contract period not exceeding four years if the district enrolls three hundred or more pupils. A.R.S. §15-444. Aside from a requirement that the superintendent hold state certification credentials (§15-102,¶20), the terms and conditions of his employment are a subject of bargaining between him and the board of trustees. The Legislature and the courts have said nothing further about the duties and powers of this officer, about the maximum amount of authority that can be delegated to him by the board of trustees, or about his standing to bring actions against his employers or other school officers on matters of policy.

3. Principals

A district having five or more teachers can employ a principal. §15-442(A). He must be state certified. The only statutory authority he wields is the power to suspend students. (§15-204) He is not covered by statutory provisions referring to teachers. Aside from these few points, his role in Arizona heretofore has been defined by custom, practice, and politics.

C. The Teacher

The Arizona school teacher has no legally protected area of discretion in determining school curriculum. The teacher is directly subject to <u>state</u> curriculum policy through three statutes.

I) "Every teacher shall:

* * *

3. Enforce the course of study, use of adopted textbooks and the rules and regulations prescribed for schools," A.R.S. 15-201, ¶3.

II) "The state board of education shall:

* * *

21. Prescribe rules and regulations and supervise and control the certification of teachers.

* * *

22. Revoke all certificates of life diplomas for immoral or unprofessional conduct or for evident unfitness to teach." A.R.S. §15-102, ¶¶21,23.

III) "A teacher who fails to comply with any provision of this chapter is guilty of unprofessional conduct and his certificate shall be revoked." A.R.S. §15-208.

Although no state official has the authority to directly discharge a teacher employed by a local board, the local board may only hire teachers who have valid state certificates. A.R.S. §15-443(B) Thus, one scenario for state sanctioning would be:

a) State Superintendent finds that teacher primarily taught out of non-state-adopted texts -- violation of §15-201.

b) Superintendent finds that the violation of §15-201 is "unprofessional conduct" as defined by §15-102, and by §15-208.

c) State Board revokes teacher's certificate.

d) Local board discharges employee.

The Arizona Court of Appeals and the Attorney General have both stated that the Board has very broad discretionary authority to determine what constitutes unprofessional conduct. Kimball v. Shofstall, 17 Ariz. App. 11, 494 P.2d 1357 (1972); Op. Atty. Gen. 71-12 (1971).

At the local level, the teacher must follow the directives of his supervisors, otherwise face non-renewal (if probationary) or discharge, on the grounds of incompetency, insubordination, or lack of cooperation

(the Arizona Supreme Court has called the latter behavior, "a subtle form of insubordination" School District No. 8, Pinal County v. Superior Court of Pinal County, 102 Ariz. 478, 433 P.2d 28 (1967)). The Legislature has implied, however, that the high school teacher deserves at least slightly more autonomy than the common school teacher. A.R.S. §15-543(D) states:

> "The board shall prescribe up to five textbooks for each course of study and the teacher, with the consent of the board of education, may use any one [of them]."

The provision saying that the teacher makes the initial choice is unusual. The only way to give it any meaning is to construe it to make the teacher's choice presumptively correct, and the local board must therefore have a good reason for withholding its consent, thereby overruling the teacher.

Any teacher who disobeys an articulate and otherwise lawful curriculum directive from one of his superiors, can be dismissed for insubordination. Complaints against teachers frequently arise, however, after the teacher has acted. Prior to the challenge, the school may have had no specific policy covering the disputed action. Even if the system had a detailed syllabus for the course, it may have fallen into disuse, and could not fairly be deemed adequate notice. In these situations, at least, the Teacher Tenure Act can accord significant protection to the teacher.

A leading case involved the dismissal of a teacher whom the school board charged with (a) several counts of misconduct, and (b) generating "controversy." When the teacher appealed, the trial court did not review the school board's findings on the specific charges, because it found that the controversiality of the teacher was, by itself, cause for the termination. The case worked its way up to the Arizona Supreme Court, which strongly criticized the trial court's action, holding that when a teacher

did not seek controversy, the fact that her actions had caused controversy in the community did not constitute "good cause" under the Teacher Tenure Act. Kersey v. Main Consolidated School District No. 10, 96 Ariz. 266, 394 P.2d 201 (1964).

Three years later the Supreme Court stated the object of the tenure law in terms which could potentially become a foothold for teachers resisting curriculum policies which they can show to have strong political overtones. The Court said:

> "[T]he broad purpose of teacher tenure is to protect worthy instructors from enforced yielding to political preferences and to guarantee to such teachers employment . . . regardless of the vicissitudes of politics or the likes or dislikes of those charged with the administration of school affairs." School District No. 8, Pinal County v. Superior Court of Pinal County, 102 Ariz. 478, 433 P.2d 28, 30 (1967), [emphasis added]

This language could also protect a teacher against whom local school officials have built up a technically adequate case for good cause dismissal, but who can show that the primary motivation for the action is dislike for the "too liberal" or "too conservative" tone of his instruction.

Finally, the Supreme Court's barrier against dismissing teachers for "violations" which they may have reasonably thought not to be violations at the time they acted, was slightly strengthened by a 1972 opinion of the Attorney General, where it was stated:

> "The teacher is an arm of the school board and must follow board policy . . . If no policy is provided, the teacher must then use his own judgment." Op. Atty. Gen. 72-29-L, at 106 (1972). [emphasis added]

Taken together, Kersey, School District No. 8, and the Attorney General's opinion reduce the chilling of teacher decisions in areas which are covered by vague policies or by no policies at all.

School board actions against probationary teachers, however, will be reviewed more casually than sanctions against tenured ("continuing") teachers, School District No. 8, supra, at 211 . (A teacher achieves tenure when his contract as a full time certificated instructor is renewed for the fourth consecutive year, A.R.S. §15-251.)[15]

D. Teachers Associations

Arizona teachers may not strike, and they have no right to consult collectively with their employers about the terms and conditions of their employment. Approximately fifty state school districts have voluntarily established professional negotiation (PN) arrangements.[16] The Attorney General and the Supreme Court have stated that this practice is legal so long as a board does not:

a) recognize one organization as an exclusive representative,

b) delegate any of its statutory powers and duties, or

c) make any agreement which extends beyond the term in office of any current board member.

Generally, school boards confine negotiations to salaries and working conditions, but some of the larger districts have been negotiating a wide range of issues including class size and academic freedom.[17] Since no board has a duty to negotiate, school officials have the right to arbitrarily halt negotiations or refuse to discuss particular subjects, and there are some districts which do refuse to negotiate with teachers and which hold their meetings at times when teachers are unable to attend.[18] A PN bill was passed in the Arizona Senate in the first half of 1975, but it was decisively defeated in the House.

The prohibition against striking has teeth. A striking teacher not only may lose his current job. His career as an Arizona educator is put

on the line because of the power of the State Board to revoke his certification on the grounds that striking is "unprofessional conduct." The Legislature has foreclosed the tactic of staging a technically legal strike by the submission en masse, pro forma resignations, with A.R.S. §15-258:

> "A probationary or continuing teacher shall not resign after signing and returning his contract, unless the resignation is first approved by the school board. A teacher who resigns contrary to this section shall be deemed to commit an unprofessional act."

According to the Attorney General, the Legislature intended to balance the hardships of the no-strike rule with the protections of the Teacher Tenure Act. The Act provided

> "statutory job protection in lieu of the right to strike." Op. Atty. Gen. 71-12, at 28 (1971).

Even if a teachers' association manages -- without striking -- to persuade a board to voluntarily enter into collective bargaining, and even if negotiations produce an agreement, the board can still breach any of the provisions of the contract, knowing that no court will order them to specifically perform their duty. The Arizona Supreme Court so held in Board of Education of Scottsdale High School District No. 212 v. Scottsdale Education Association, 109 Ariz. 342, 509 P.2d 612 (1973). In its contract the Scottsdale board had agreed to participate in an impasse procedure when negotiations were unsuccessful. The panel was authorized to make non-binding findings and recommendations on salaries and other conditions of employment.[19] The Association had sought a writ of mandamus compelling the board to enter into the impasse procedure. The Court stated that the Superior Court only had jurisdiction to issue writs,

> "to compel the performance of an act which the law specifically imposes as a duty resulting from an office."

No statute required the board specifically to enter into impasse proceedings, and no statute imposed on it the duty to refrain from breaches of contracts. The association would have to rely on other possible remedies for the breach.

In fact there was no other remedy, because the court would not order specific enforcement of the contract. The opinion is poorly reasoned. It addresses the policy issues and the peculiar context of the contract when it finds that a mandamus action is inappropriate, but it does not consider the bearing of these policies on the question of enforcing the contract. It would seem that enforcement would have furthered the state education policies -- it would have led to the issuance of an unbiased and expert evaluation of the labor dispute. The report would have helped the constituents of the school officials to inform themselves about the issues, and to evaluate the performance of their representatives. At the same time, the report would be non-binding, so that no board powers would have been delegated. The United States Supreme Court discovered years earlier that a collectively bargained labor agreement "is more than a contract."[20] The Arizona court, however, failed to undertake the analysis that that recognition implies.

Given the restrictive presumption of board authority, the right of local officials to enter into collective negotiations must be traced to a source. The Court of Appeals opinion in Scottsdale makes an implied powers argument which was recently cited approvingly by the Attorney General, in Op. Atty. Gen. No. 75-8-C (1975).

> "[T]his power to hire teachers, fix their salaries, [A.R.S. §15-443] and to control the operation of the school district, [§§15-441, 545] necessarily carries

> with it the implied power or authority, if the Board so desires, to consult and confer with an individual teacher. . . [W]e see little difference between 1200 teachers individually making known their desire to the Board concerning their wages and working conditions, and a representative of those 1200 teachers making known the same desires." 17 Ariz. App. at 508.

Teachers associations have no right to compel or coerce the Board to bargain collectively against its better judgment. However, if the board is persuaded to adopt certain policies regarding terms and conditions of employment, there is no impropriety in embodying those decisions in a contract ratified by the teachers organization.

The terms of the contract must, of course, be within the statutory authority of the board, and must contain no terms which could not be included in a standard contract for an individual teacher. Scottsdale, supra (Supreme Court opinion). It follows from this rule that no authority can be delegated to an association which could not be delegated to a single teacher. Thus, the teachers organization has no special legal status regarding the statutory and state constitutional limitations on delegating policy making powers (e.g. curriculum decision-making) to private persons.

E. Parents

A parent who sends his child to public school is entitled to some participation in the process of evaluating, assigning, and recording the performance of the child. However, parents have no greater right to help shape curriculum policy than do other citizens and taxpayers.[21]

As a practical matter, parents often make a disproportionate impact on official decisions about decision-making because they participate with extra vigor in political processes, and because having their children "on the line" enhances the cridibility of their opinions. When the Madison

Board of Trustees had to decide whether to retain the curriculum, Man: A Course of Study (see case study, supra at 230) it took into account two polls that tested the opinions of parents with children in that particular course. At the same time, supporters of MACOS did not fail to point out that the course's foremost critic had no children who were in the course.

The parent is constitutionally guaranteed the right to send his child to a private rather than public school. However, if he does use the public schools, the parent must send his child

> "with instructions to obey all the proper rules and regulations of the school." State v. Davis, 58 Ariz. 444, 120 P.2d 808, 812 (1942).

In Davis, the Arizona Supreme Court sustained the prosecution of Jehovah Witness parents who instructed their child not to salute the American flag. A year later (in West Virginia v. Barnette, 319 U.S. 624 (1943)) it became the law that such a prosecution abridged the free exercise of religion. However, the case still stands as a precedent for the general proposition that a parent must cooperate with the school in disciplining his child.

Parents have statutory rights to participate in or oversee the evaluation and assignment of their children. If requested, a school district must permit a parent to inspect his child's records. The parent may bring one person of his choosing to participate in the review. If the parent believes there is an inaccuracy, he may give notice to the district and shall have a right to attach a written response to any item in dispute. A.R.S. §§15-151-154. The participation of parents in student placement under the Special Education Act was discussed, supra at . In particular,

> "[N]o child shall be placed or retained in a special education program without the approval of his parent or guardian." A.R.S. §15-1013; See also §15-1014.

There are no statutes or cases pertaining to a) how a parent might prove the damage its child has suffered from incorrect records, evaluations, or placements; nor to b) what remedies could be awarded to the parents if such proof were made (e.g. money damages, corrective placement in private facilities with state paying tuition.)[22]

Although there was a lot of talk about parental participation in decision-making during Superintendent Shofstall's term in office,[23] there was little noticeable action in that direction at the state level. The State Board's Policy Book establishes and recommends certain procedures that would make it easier for parents to inform themselves about current courses of study and proposed textbook adoptions, and to make their opinions known to responsible officials. Parents or guardians shall, on request,

> "be provided with a copy of the current state adopted course of study in the subject of their interest and a list of the current state adopted textbooks in that subject area . . . "

Also, parents, guardians, or patrons may,

> "(a) View all instructional materials considered for adoption at the Department of Education after the publishers file copies;
>
> (b) Purchase from the publisher such proposed books;
>
> (c) Testify at the hearings held by the Board for consideration of the state adopted textbooks and approved supplementary books, prior to final adoption of such books."

Finally,

> "It is highly recommended that district school boards develop procedures:

(a) For parental review and participation in textbook selection:

(b) For parents or guardians to view all instruction materials upon request." Policy Book, Rule 4(e)(5). [emphasis added]

Given the predominance (at least in the common schools) of the state-centralized textbook selection, these rules are all but meaningless except for parents organized into broad-based lobbying groups. Moreover, the "rights" being given are so fundamental that the failure to extend them to citizens who are not parents is striking. Compare these "participation" procedures with the Massachusetts statute requiring that a high school offer "any" course which is requested by twenty petitioning parents. Mass. G.L. c.71, § 13.

The only reference in the Education Code to rights of parents organized into corporate groups is found in A.R.S. §15-541, which authorizes a district board to allow a parent teachers' association (or certain other civic groups) to use school facilities for several wholesome purposes. (See also, Op. Atty. Gen. 57-70 (1970)).

F. Students

Arizona public school students have no specific authority to participate in control of school curriculum. To the contrary, the legislature has explicitly commanded them to accept whatever is handed down to them—

"Pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers and the governing board." A.R.S. §15-305(A)

And to accept it gracefully —

"Continued open defiance of authority or habitual profanity and vulgarity[24] constitute good causes for explusion." § 15-305 (B)

A student who wants to challenge a school board curriculum policy is usually in a better position to obtain an administrative hearing and/or judicial review than other persons. In Section IV of this chapter, we examined the standing and reviewability hurdles facing a potential plaintiff wanting to press a declaratory judgment action or to secure judicial review under the JRA. A student who refuses to abide by an allegedly unlawful policy can provoke his own suspension or expulsion, or attract other sanctions. At least in the case of suspension or explusion, the student is being deprived of property and liberty, which cannot be done without according him due process of law.[25] Although it is not always clear exactly what process is due, the student certainly must have a right to a hearing on the question whether the policy on which his suspension is based is unlawful.

Accordingly, Arizona courts adjudicating suspension cases[26] have regularly reviewed the validity of school regulations. In Komadina v. Peckham, 13 Ariz. App. 498, 478 P.2d 113 (1970), the Court of Appeals invalidated a grooming regulation on the ground it was arbitrary and unreasonable because it had no relation to safety or discipline. Later, the Supreme Court overturned a similar Court of Appeals ruling, in Pendley v. Mingus Union High School District No. 4 of Yavapai County, 109 Ariz. 18, 504 P.2d 919 (1972). In one case the Court of Appeals found that a suspension was invalid because it was ordered by an official having no proper statutory authority, Burnkrant v. Saggau, 12 Ariz. App. 310, 470 P.2d 115 (1970); in another case the same court found that the school rule on which a suspension was grounded did not apply to the alleged behavior of the student, Nunez v. Superior Court, Pima County, 18 Ariz. App. 462, 502 P.2d 420 (1972).

Pendley is a reminder that whatever advantage a student might have for getting into court, the rule of "deference" still remains to narrow the scope of judicial review. Moreover, in order to get his chance to challenge the policy, the student has to take the risk that his suspension or expulsion will be upheld. Although plaintiffs prevailed in Burnkrant and Nunez, neither case involved a finding of abuse of discretion -- in Burnkrant the official misconstrued a statute; in Nunez the official ignored the clear language of the rule he purportedly applied. In Pendley, by comparison, the official decision rested on a factual premise about the likely effect of grooming styles on school discipline, and on a policy judgment about the relative importance of individual student freedom as opposed to perceived institutional interests. To this exercise of judgment the Supreme deferred.

v. Lopez (footnote 25, supra)

An expansion of the Goss doctrine by federal or state courts could increase the ability of students to influence aspects of their instructional program. Future court decisions may expand the category of actions which constitute deprivations of liberty and property to include: confinement in the principal's office several hours each week; assignment to a class in which instruction is so out of phase with the student's capabilities that he cannot benefit from it; refusing to issue a diploma to a student who refused to take a required course of study that he alleged was illegally mandated; refusing to furnish transcripts or letters of recommendation to colleges and employers. If the law required an administrative hearing in each of these cases, then the hearings would subsequently be reviewable under the JRA. Under current law, as was pointed out in Section IV, the school is under no legal obligation to hold a

hearing in most cases. Petitions for relief can be ignored, with the result that there is no "decision" to be reviewed under the JRA, and the aggrieved person is in the difficult position of trying to obtain review under the declaratory judgment act or mandamus act. Recognition of a constitutional right to an administrative hearing makes the statutory procedure for judicial review of administrative action more readily available.[26A]

Whether Goss will be expanded in these directions is open to doubt. Justice Powell, dissenting, warned against the inevitable pressure to extend this finding of a liberty and property interest to also include the consequences of official actions which are more "routine" than suspension. It is possible that one or more of the justices voting in the majority predicated their votes on the belief that suspension could be preserved as a special case, and the holding would not be stretched to apply to other official actions. Even if Goss is not specifically made to apply in the kinds of situations we have postulated, the decision may cause Arizona courts to reconsider its doctrine of extremely lenient review of the decisions of school officials. Goss is part of a trend running through both constitutional decisions and state legislation to recognize the right of students to certain kinds of educational services. As more and more student interests become rights, the school official's expertise and political accountability become less compelling reasons for according him virtually untrammeled discretion in weighing individual student interests against his perceptions of institutional interests. It is the court's role to see that the official pays due deference to these rights.

* * * *

Whatever rights Arizona students have, can they only be asserted with the consent of the parent or guardian of the minor? Rule 17(g) of the Arizona Rules of Civil Procedure provides:

> "Whenever an infant . . . has a representative, such as a general guardian, or similar fiduciary, the representative may sue or defend on behalf of the infant. . . The court shall appoint a guardian ad litem for an infant . . . not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant. . . " 16 A.R.S. Rules of Civil Procedure, rule 17(g).

A juvenile court judge may appoint an attorney to serve as a guardian ad litem when

> "The court finds that there is a conflict of interest between the child and his parents, guardian or custodian." 17 A.R.S. Juv. Ct. Rules of Proc., rule 22.

At least as a procedural matter a state court has some flexibility in appointing representatives. Parents, however, are the general representatives of the child, and to some extent this role is constitutionally protected. Meyer v. Nebraska, 262 U.S. 390 (1923). On the other hand, there are situations in which the interests of parent and child may be in conflict, and the state has legislated to protect the child's interests. Two common areas are neglect and guardianship proceedings; and adjudications of wills, trusts, and estates. For example, in proceedings involving the trusts or estates of minors, A.R.S. §14-1403 allows a parent to represent his minor child

> "if there is no conflict of interest."

Title 14, Chapter 5, Article 2, deals generally with protective proceedings in superior court. It provides that any person interested, or a child over fourteen years old, can petition for removal of that child's guardian. A.R.S. §14-5212. The requests of minors over fourteen are also accorded legal status in §§14-5203, and 14-5206.

It is much harder for a court to discern "conflicts of interest" between parent and child in regard to school curriculum than it is in the distribution of property. It at least appears that if a person petitioned a court asking to be appointed representative of a student in a specific legal action, and if the parents, after being notified of the petition, did not object, then the court would have authority to appoint the representative. However, if the parents objected to the course of action contemplated by student and representative, the court would have to find a legally cognizable conflict of interest between parent and child before having authority to appoint the representative. On the constitutional dimensions of this problem see, Wisconsin v. Yoder, 406 U.S. 205 (1972), Douglas, J. dissenting in part,

G. Taxpayers and Citizens

As a citizen or taxpayer, one's only legally protected channel for influencing school curriculum is through electoral politics, except in rare cases when taxpayer status may be deemed sufficient ground for standing to obtain judicial review of an official action. (That is, standing to press a state law claim. Constitutional standing is a separate issue.) See section IV(C).

There are some special electoral mechanisms designed to permit direct participation in certain local school decisions. A.R.S. §15-1302 (bond issues, purchasing or selling school sites, buildings, capital equipment); A.R.S. §15-1202.01 (budget increase beyond certain statutory level). Recall, intitative, and referendum are examined in section I(B)(2). The Special Education Act establishes an advisory committee on special education with lay members. A.R.S. §15-1012.

VI. Private Education

There is no direct public regulation of the curriculum in Arizona's private schools.' In a recent opinion, the Attorney General stated unequivocally,

> "[T]he State Board of Education has no statutory power over the private schools of this state and may not, therefore, accredit or in any way attempt to regulate such schools."
> Op. Atty. Gen. 73-26-L (1973)

The compulsory attendance law, however, enables local officials to exert indirect pressure on the content of private education. A parent who places his child in private instruction in lieu of public school is guilty of a misdemeanor, unless this private education satisfies one of the exemptions in the compulsory attendance law, A.R.S. sec. 15-321. The statutory standard for instructional quality is expressed in the general terms, "competent teachers," and "common school subjects." Satisfactory compliance with the standard is judged by the local board of trustees and the county superintendent.

One scenario for indirect regulation of private education would be a board refusing to grant a parent an exemption for his child on the ground that the child's private school teacher was not competent. Unless the school could get a court to overrule the determination, it would have to remove the teacher or else face an exodus of students. (The example assumes a private school most of whose pupils live within the jurisdiction of the board that rendered the adverse decision.)

Two statutory exemptions of particular relevance to private education are these:

> "B. A person shall be excused by the board of trustees . . . when it is shown to the satisfaction of the board and the county school superintendent that:

1. The child is instructed at home by a competent teacher in the subjects given in the common schools of the state.

2. The child is attending a regularly organized private or parochial school taught by competent teachers for the full time that the public schools of the district are in session." (emphasis added)

The home instruction clause is relatively liberal. Some states refuse to recognize home instruction at all as a substitute for public school instruction; others impose extra stringent standards on home teachers. (California requires that home but not private school teachers hold state licenses.) Arizona home instruction is subjected, however, to the requirement that it cover the common school areas, a standard not imposed on organized private schools. A large number of states demand that home instruction and private school instruction be "substantially equivalent" to what the child would otherwise receive in the public schools.

In practice, the statute's formulation of the curriculum quality standard is probably less important than its procedure for enforcement. The law appears to vest considerable discretion in the board members and county superintendent. The "competent teacher" guideline can support a variety of interpretations. On the other hand, the "competent teacher" standard is less localized than "substantially equivalent" to instruction in the public school the child would otherwise attend. That is, local school officials are more expert at assessing the quality of instruction available in their own schools, than they are in formulating a state-wide standard of teacher competence. All other things being equal, a court is less likely to defer to a board's finding that a teacher is not competent than it is to defer a board's finding that instruction in private school X is not substantially equivalent to instruction in public

school ? (which the child would otherwise attend).

The scope of discretion of the board and superintendent is also clouded by the juxtaposition of the phrase "shall be excused" and "to the satisfaction." If the legislature had intended a quasi-objective evaluation procedure, it could have stated:

"A person shall be excused if it is shown to the board . . . "

And a more discretionary test could have been suggested by the language:

"A person may be excused if it is shown to the board . . . "

The actual language, however, is ambiguous -- "A person shall be excused if it is shown to the satisfaction of the board . . . . " A person urging a more objective standard would argue that the phrase "to the satisfaction" contains an implied condition that the board and superintendent be satisfied by whatever circumstances would satisfy a reasonable person. The advocate of greater official discretion would contend that an adverse finding by the officials was legally binding so long as made in good faith.

Our discussion has focused on the first two exemptions in the compulsory attendance law. There is another exemption, however, which is almost standardless. It reads:

"[The parent is excused if]

> 5. The child has presented reasons for nonattendance which are satisfactory to a board consisting of the president of the local board of trustees, the teacher of the child and the probation officer of the superior court of the county." (emphasis added)

There are no cases stating what "reasons", if any, were not contemplated by the statute. The third, sixth and seventh exemptions are mentioned in section II, Legislature, under the heading, Student Classification.

Finally, one should note an omission in the Arizona law which gives parents an important procedural advantage. Some states require that a parent obtain advance approval before placing his child in private instruction. Massachusetts has such a provision, and in Commonwealth v. Renfrew, 332 Mass. 492, 129 N.E. 2d 109 (1955), the highest court of that state held that failure to secure advance clearance was an independent violation of the statute. The quality of the instruction the child was receiving, no matter how excellent, was no defense to the charge. Thus, the trial court was upheld in its decision to deny the defendant parents the opportunity to introduce evidence which they said would show that their child's education program was clearly equivalent to the public school program the child would otherwise attend. They were convicted. The Arizona statute has no advance approval requirement. Consequently, parents are never precluded from introducing evidence showing the quality of their child's private instruction.

ADDENDUM TO SECTION V: TWO CASE STUDIES

A. Free Enterprise--Local Resistance to a State Mandate
page 230

B. Man: A Course of Study (MACOS)
page 248

Case Study: Free Enterprise, local resistance to a state mandate

Formal authority to control curriculum is no guarantee of actual control. In 1971, the Arizona Legislature mandated a course of instruction in the "free enterprise system." The Superintendent of Public Instruction, Dr. Weldon Shofstall, greeted the directive enthusiastically, and moved to implement it. Three years later Shofstall's commitment to the idea of the course was hardly diminished,[1] but he admitted that what was being taught in Arizona high school classrooms to satisfy the legal requirement was not what he, or the law's sponsors, had in mind --

"[W]e have not been very successful." Teaching, at 11.

Long before Shofstall made this statement, the Department of Education had given up trying to enforce a detailed course in the public high schools. To the contrary, it was permitting schools to teach the basic concepts of free enterprise in any way they chose--even in comparative courses which included study of Soviet and Chinese economics. It even allowed schools to place out students who showed comprehension of the concepts by passing an examination. What happened between 1971-1974 to bring about this result?

The answers to this question reinforce a theme of Arizona curriculum law— centralized authority over school curriculum is a powerful, but a relatively blunt instrument. The state legislature, the Board, or the Department can squelch many local plans and policies, but it cannot effectively carry out its own policies without persuading local officials and educators of their value. The free enterprise dispute foreshadowed later events in the battles over the basic goals commissions, (See supra, at) in that the Department was forced to make the details of its course syllabus "recommendatory", rather than mandatory. And the shift from command to persuasion was institutionalized in the creation of a division

within the department that devoted itself to training teacher volunteers and to giving support to anyone trying to improve free enterprise instruction.

"I am not a spy," said Dr. Carolyn Conrath, who was hired as a consultant to direct that project. Eager to prove that the state agency was not trying to achieve the goals of the free enterprise statute through any form of pressure, Conrath pointed out that she had never visited a high school without being invited, and that she had not even observed a free enterprise class in progress.[1A]

Legislative Purpose

What many Arizona legislators had in mind when they voted for the Free Enterprise law is a matter of dispute.[1B] The sponsors of the legislation, however, were consistent in stating their objectives. The problem, as they saw it, was that the United States was drifting towards socialism. Arizona schoolteachers added momentum to the drift by encouraging students to question the social value of private ownership, by attacking the profit motive, and by propounding the necessity of having a mixed economy.

As Tim Barrow (who, as speaker of the House, helped to pass the act) put it:

> "[S]chool systems today are teaching socialism, not necessarily as a way of life but as a historical thing.... [T]eaching the free enterprise system with the same zeal would be giving them a choice." [emphasis added] Arizona, at 8.

"Them" must refer to the school children. Jim Skelly, chief sponsor of the bill, said a key element of "their choice" is,

> "that a youngster will have some foundation to stand on when he does come up against professors that are collectivists or socialists."
> Arizona, at 6.

Clearly, the sponsors had in mind a course that would teach only the arguments for free enterprise. It would be one sure counterweight to the pervasively liberal bias of public school instruction.

Critics of the bill testified that the tenor of high school teaching in Arizona was not indoctrinatory, but that the proposed curriculum statute most certainly was. They stressed the provision for teaching the "benefits" of one economic model. The sponsors understood this to mean that only the benefits, and not alleged drawbacks, would be taught. For example, Theodore Mote[2] recalls Senator Conlan making a statement to the effect that,

> "We don't want a comparative economics course like Mote taught at Camelback High School. [Interview with Theodore Mote, July 1974]

An amendment, which would have struck out the word "benefits," failed to pass.

As enacted, the statute is codified as A.R.S. sec. 15-1025, and reads as follows:

> "A. All public high schools shall give instruction on the essentials and benefits of the free enterprise system. Instruction shall be given in accordance with the course of study prescribed by the State Board of Education for at least one semester, equal to one-half unit or credit. The State Board of Education shall prescribe suitable teaching material for such instruction.
>
> B. The costs of such instruction, except those of the State Board in prescribing the course of study, shall be an expense of the school district involved.
>
> C. As used in this section "free enterprise" means an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision rather than by state control, and by prices, production, and the distribution of goods that are determined in a free manner."

In April 1973, the House Education Committee voted down a proposed amendment which would have given localities much more discretion in

shaping course content. Rep. Anne Lindeman, in opposing the amendment, said she thought the course, even under the present law, was not being taught in a "meaningful way." Rep. John Wittlaw similarly complained the course had been watered down far too much already:

> "Just because you pass a test[3] doesn't mean you believe in the concepts." [emphasis added]
> Phoenix Gazette, April 26, 1973.

Plans for a lawsuit

Having failed to convince enough legislators to reject the bill because of its alleged indoctrinatory characteristics, some opponents of the course began planning a suit to challenge the constitutionality of the statute.

The leading attorney in this effort was Kenneth Reed (a member of a private firm in Phoenix). The potential plaintiffs consisted of a cross-section of persons arguably affected by the statute-- a high school teacher, parents of school age children, a high school senior (who alleged, among other things, that having the free enterprise course on his transcript hurt his chances at being admitted to an Ivy League college).

Reed considered the state courts to be an inhospitable forum for bringing claims of infringement of rights of speech and dissent.[4] So inhospitable, that they might even contrive a holding to create technical obstacles to U.S. Supreme Court Review. Thus, if he went forward, it would have been with a complaint in federal district court asking for formation of a three-judge panel.

The potential litigants were not wedded to the goal of having the statute declared unconstitutional on its face. They would have been pleased with a holding construing it--in order to save it from unconstitutionality--to allow teaching free enterprise in a comparative or critical

perspective. That is why the complaint was never filed. In practice, the litigants thought they got the "relief" they wanted. It resulted from administrative, and from informal political processes. The teacher in the group, for example, concluded that he could, under the department's later interpretation of the statute, teach an intellectually honest economics course under the free enterprise banner.[5]

The suit never went far enough for Mr. Reed to refine a theory of the case. His basic idea was to analogize the free enterprise course to religious instruction, to maintain that it was indoctrinatory, and to rely primarily on Epperson v. Arkansas[6] for authority. His model for relief was similar to that in the Establishment Clause cases--an injunction against the teaching of the course at all (or else against the teaching of it in the indoctrinatory form desired by its sponsors). He had not considered the possibility of individualized relief for different subclasses of plaintiffs, e.g. giving the right to opt out to students who could show that participation in the course prevented their free exercise of religion, as in West Virginia v. Barnette,[7] and Wisconsin v. Yoder.[8]

Implementation in theory: Can the objectives of the sponsors be achieved with a course which is not indoctrination?

As a part of his advice to Texans who were thinking about how to implement their new free enterprise law, Arizona Superintendent Shofstall stated:

> "Finally, you cannot emphasize too much that this should not be a propaganda course but a course which seeks to contrast free enterprise with the mixed economy; with the controlled economy or with a system of government intervention. There is no doubt about the results of an honest comparison." [emphasis added] Teaching, p. 10.

It is hard to know what to make of this statement. On the one hand, Shofstall seems to be advocating a very open approach to the subject.[9]

But the second sentence makes one wonder what concept he has of an "honest comparison." If, as he implies, an "honest comparison" always results in one believing in free enterprise, it is hard to see how an "honest" course cannot be based on an indoctrinatory premise. That is, the premise that no one can rationally conclude that a free enterprise system is inferior to a mixed or a controlled economy.

Shofstall's "honest comparison" also shows his concerns about curriculum sabotage. Even if the truth were beamed out from the statehouse, liberal teachers were in a position to jam the signals. He wanted a teacher-proof course. But how much subtlety can one build into a curriculum dealing with controversial political and social issues but which leaves virtually no discretion in the hands of the teacher? Consider the difficulties of formulating a judicially manageable standard of indoctrination in this context. How much weight do you put on the materials? How much on the teacher? How much on the classroom product? In one case, state or local school officials might mandate the use of materials strongly biased for free enterprise, but only because they believe it necessary to balance the opposite biases of teachers. Is a judicial examination of the materials alone, dispositive of an indoctrination claim? Or should the court primarily consider the classroom outcome? Or must it look at the total context, and rest its decision on whether or not the officials tried, in good faith and with a basis in reason, to produce an honest comparison in the classroom?

An alternative to using "teacher-proof" materials is to put the course in the hands of teachers who believe in free enterprise. (As described below, Conrath was retained by the Department to develop just such a free enterprise teacher cadre.) Thus, another factual variation for possible judicial scrutiny would be one in which: the materials are balanced; the teachers are biased; and the classroom experience is believed by some but not all students to be a biased one.

Returning now to the hidden premise behind Shofstall's "honest comparison," there is considerable evidence in the Superintendent's public statements of a belief that no American can rationally prefer any other system over free enterprise. For example, Shofstall's Texas speech repeats the metaphor of battling with the "enemy." He enumerates the dishonest motives of intellectuals and teachers, the primary foes of free enterprise. He says that intellectuals advocate economic equality because they envy the wealthy; they smart at being snubbed by elite social clubs. What they don't understand is that in a free market the best producers get material rewards that enable them to buy these things but the rest of society, even though its rewards are less lavish, is still better off because of the efforts of their betters. Anti-capitalists (primarily intellectuals)--

> "'are socialists because they are blinded by envy and ignorance.'" Teaching, at 6, quoting approvingly from L. Von Mises, Planned Chaos, at 46 (1947).

Other reasons cited by Shofstall for opposition to the course were a) teachers automatically opposed any innovation that could threaten their jobs or make them work harder,[10] and b) some persons will oppose any curriculum that is state-mandated. And, finally, there was simple arrogance to blame:

> "[I]ntellectuals don't have much respect for the choices of the great mass of consumers." Teaching, at 6.

Nowhere in the speech is there any hint that an opponent of free enterprise might have a basis in reason, one untainted by envy, ignorance, laziness, arrogance, or self-interest.

The hidden premise also has conceptual roots. Shofstall simply does not accept the idea that the so-called mixed economy <u>is</u> an independent model. To put this another way, he does not think the economic arrangements that have been called mixed economy represent a stable equilibrium. Rather, this form of government intervention is nascent socialism in disguise; it is a stretch

of ground along the slippery slope to a totally government controlled economy. Shofstall notes that the conventional wisdom taught in public school is that the American mixed economy stands in an advantageous position midway between capitalism and socialism; it enjoys the benefits of each system but manages to cancel out the disadvantages of each. This premise sets up the following argument:

a) no one who values political, economic, and personal freedom can rationally favor socialism;

b) mixed economy is merely an early stage of socialism, therefore an advocate of the mixed economy is (perhaps unwittingly) an advocate of socialism;

c) liberals value freedom;

d) because freedom and socialism are incompatible, it is irrational to say one believes both in freedom and the mixed economy.

e) therefore, one cannot rationally support the idea of the mixed economy unless one favors socialism (and loss of freedom);

f) the public school is under no obligation to teach socialism, because its tenets contradict the Constitution; the public school cannot very well promote the concept of the mixed economy, because it is irrational to simultaneously support the Constitution and that theory; to promote the conclusion that free enterprise is the appropriate economic system for the United States is not indoctrination because it is the only economic system consistent with the preservation of constitutional rights.

The argument is laid out to show that when Superintendent Shofstall calls for an honest comparison, he may be referring to a comparison that many persons would consider indoctrinatory. Could a court, on review, find judicially manageable standards to grapple with the intangible complexities of claims of indoctrination in this context? If judicial review is limited

to whether state school officials tried, in good faith, to promote "honest comparisons" and to avoid "propaganda," in the free enterprise course, then it would be hard to judicially overturn any decisions of the Department based on charges of indoctrination. Disgruntled citizens would be left to exercise their political remedy, electing a different Superintendent and electing a Governor who would appoint Board members with different views. As has already been noted, Arizona courts never came close to deciding such questions.

Implementation in fact: Free enterprise backers forced to scale down their objectives

Superintendent Shofstall and Dr. Conrath shouldered much of the state level responsibility for transforming the law into an active course of instruction. In their view, they continuously battled against two strong forces: opposition to state curriculum mandates in general; particular opposition to pro-capitalist instruction. They apparently concluded that the formal, bureaucratic means of control at their disposal were not suitable instruments, by themselves, for installing free enterprise courses that would be taught in the spirit of the statute's sponsors.

A personalistic strategy emerged. Shofstall and Conrath focused on finding free enterprise instructors who were "enthusiastic," "interested," and "dedicated." In order to give attitude the priority it deserved, Shofstall decided that prior experience should be downplayed as a teacher selection factor.

> "We do not mean that teachers should be certified only through the usual procedure of taking a certain number of prescribed college courses . . . [E]nough literature [is] available that if teachers are willing to learn about free enterprise, they can do so . . . [O]ne of the best ways to learn about anything is to try to teach it to somebody else." Teaching, p. 9.

That was not the first time the Superintendent expressed his interest in

reducing reliance on academic credentials for selecting Arizona's teachers. He has also advocated performance based certification, and has favored dropping the certification requirements for a year of graduate study. see supra, at 63 .[11]

The Department of Education's main role in supporting this policy (which might be called "enthusiasm first") was to train and provide back-up services for newly selected free enterprise teachers. When Conrath joined the Department, she set her sights at developing a "cadre" of 292 teachers. In the summer of 1974, she had trained 70 teachers (55 of them in summer workshops), and with her contract ending the following January, she was running well behind her goal. To understand the reasons for this setback, one needs to know something about the earlier evolution of the implementation strategy.

The statute went into effect without anyone knowing exactly what a free enterprise course should look like. The only existing syllabus was the text of the statute. There were no textbooks. Tensions ran high during the year after enactment. Many educators perceived--from the statute and from some of Shofstall's public statements-- that they were going to have a detailed, inflexible, and (in their eyes) intellectually dishonest course shoved down their throats. The absence of commercially available materials may have seemed particularly ominous. If the State Board's adopted textbooks were to be written by the Department of Education, the already narrow choice of districts in selecting materials would be circumscribed even further. The Department secured an Attorney General's opinion stating that the statutory requirement that the state textbook list for a mandatory course include a minimum of three books did not apply to a situation where less than three bids were received from publishers.[12]

The publishing by the Department of Education of its "Free Enterprise Syllabus," in 1972, was reason for some relaxation of tensions. The heart of the course was twenty-one "basic concepts." Almost all were relatively non-controversial -- one could just as well use them as the building blocks of a "liberal" course in microeconomics as the foundation of an ultra-conservative course in free enterprise.[13] The syllabus was certainly less doctrinaire in form than many of the statements that were later to emanate from state curriculum commissions. (See section III, D, 4.) Contrast the firm beliefs of the statute's sponsors, about the relationship between economics and politics, with this statement:

> "Democratic societies are generally associated with the market system, and economic freedom and political freedom usually go hand in hand. That it is not totally a straightforward relationship can be explored by examining British experimentation with socialism after World War II and Sweden, as examples."
> Free Enterprise Syllabus, at 17.

The greatest cause for relief among those fearing an attempt at outright indoctrination was the important role reserved for the teacher. This role was implicit, in the relative brevity of the syllabus, and explicit, in the following statement:

> "[T]he organization of materials, selection of learning activities, selection of resources, and the techniques of evaluation remain within the purview of the teachers' professional judgment as he provides for individual differences."
> Free Enterprise Syllabus, at 7.

Another loosening of the reins of state control occurred when Shofstall approved a testing-out policy in Fall, 1972. The Department prepared an objective test on the twenty-one free enterprise concepts, and any high school student who passed it was excused from actually taking the course. In a contemporaneous newspaper article, Shofstall is quoted as explaining this policy

as a way to prove that free enterprise was not, as teachers had charged, merely a "patriotic economics course." Testing out, he reasoned, demonstrated that the object of the course was to teach generally recognized economic concepts, not to inculcate a narrow set of values. According to Conrath, another reason for instituting the test was to minimize the disruption of the academic programs of high school seniors who had planned their courses before the law was passed.

Local control of the testing was almost complete. The Department did not designate a passing grade, nor did it prevent districts from substituting their own tests. In the Phoenix Union High School District, 2394 students took the Department's test in the fall of 1972. The passing rate was 36%.[14] In at least one high school[15] in that district, the social studies teachers thought the test was much too simplistic. Although they were not enthusiastic about the free enterprise course, these teachers wrote what they considered to be a more challenging and sophisticated examination. They wanted to uphold the general academic standards of the high school.[16] Fewer students passed the local test than had passed the state test, and those who did usually were students who have seriously prepared for it (e.g. by reading chapter summaries in the textbooks, by expanding on what they have learned in business courses or in junior achievement projects). The social studies chairman at Camelback says that most students there strongly prefer elective courses to free enterprise, but she is confident that the free enterprise instruction in her school is competent, with substantive coverage of economics concepts and issues. To a large extent, it has been taught as a comparative economics course, using textbooks with comparative materials, and some supplementary materials on the Soviet Union and China.

Camelback's policies may not be typical of Arizona free enterprise courses.[17] What is more significant than the prevalence of the Camelback

approach, is that Conrath, speaking on behalf of the Department, vigorously asserts that the kinds of policies that that school has adopted are consistent with state law and policy. If the basic concepts are taught to every student, the school has discharged its obligation. The vehicle for instruction is up to the school —

> "Call the course anthropology/free enterprise!"
> Conrath interview, July 1974.

This is not to say that Conrath does not have strong ideas about how she would like the course to be taught. Calling herself "the Billy Graham of free enterprise", she expresses her concern in restoring faith in business and in the profit motive. For example, after the energy crisis began to strengthen the advocacy of strong government intervention (or ownership) in energy industries, some oil executives took encouragement that courses like free enterprise would help to counteract such notions. Apparently, Conrath would like to see the course play that role.

Though she thinks the content of free enterprise instruction has improved since the tense period following enactment of the law, Conrath admits that it is a long uphill battle to make the course into what she and its sponsors have in mind. There are traces of bitterness, and condescension in her depictions of Arizona teachers. She thought it outrageous that a teacher might agree to teach a course, and then resist its mandates; the time for dissent is before going into the classroom. Moreover, a properly enthusiastic teacher would not insist on being paid for every workshop hour of training. As mentioned earlier, Conrath was, in July 1974, falling far short of her goal of training a cadre of 292 teachers. Among the reasons for this has been lack of interest in free enterprise in colleges with education programs.

Conclusion

1. The hiring of Dr. Conrath represented the Department's decision to "enforce" the free enterprise law through persuasion and support rather than through command, investigation, and sanction. Considering the opposition to and distrust of the free enterprise course by local educators, it is unlikely that the rejected approach could have substantially achieved the goals of the law's sponsors, even if the Department was given additional resources to devote to monitoring and disciplining administrators and teachers. Notwithstanding the leverage of state textbook selections, Shofstall's idea of an "honest comparison" will not be widely achieved unless the course is being taught by devotees of those values. The Board and Department could only guarantee the installation of "enthusiastic" teachers in free enterprise classrooms by making politically impractical intrusions into the authority of local districts. The theoretical alternatives could have included, for example:

a) A separate certification procedure for free enterprise teachers;

b) A requirement that no instructor be assigned to teach free enterprise without being approved by a designated state official. (This could function by itself, or in conjunction with (a).)

c) Formation of free enterprise teaching faculties within the Department of Education. Free enterprise would then be taught in local high schools by teachers under contract with the state. Conceivably, they might have no connection with the school aside from teaching the course. (Enabling legislation would be needed if the state teachers were to be imposed on unwilling school districts. See A.R.S. §15 -).

It is indicative of the secondary political limits on legal control of curriculum, that although the free enterprise statute is the most detailed

Arizona curriculum law, it has also become the first legislatively mandated course for which the Department has approved large scale testing-out. For whatever reasons plenary state legislative politics resulted in passage of this controversial law, the politics of the schools made it impossible for the detailed objectives of the sponsors of the legislation to be carried out in the classroom. Not only is this reflected in having the placement exam, which kept some students out of the mandated course altogether, but also in the failure of staunch free enterprise backers to achieve the promulgation of a detailed and mandatory teaching syllabus to be vigorously enforced in the schools.

2. It is typical of Arizona school law and politics that at no time during this vociferous dispute was any relevant action taken by a court. However, the political "solution" to this dispute might someday be a judicially imposed remedy in a litigated case.

Opting out of a potentially value-laden course by passing a substantially value-free examination is akin to receiving judicial permission to opt out of a course because of a constitutional claim based on the values imparted by the course. Of course, the prerequisites for judicial opting out would be somewhat different,(e.g. the plaintiff probably wouldn't have to take <u>any</u> exam) but the history of this dispute points to the political acceptability of that form of judicial relief.

3. Although the law's sponsors did not get exactly the kind of course they wanted, one should not overlook some side-effects of the law which are probably to their liking. One body's power to mandate courses necessarily contains the power to restrict another body's discretionary control of curriculum. By pre-empting a portion of every high school student's schedule, the legislature limited the choices of the Board and of local districts in trying to develop what is, in the view of each, the best overall course

content. If the legislative prerogative is widely exercised, warned Kay Murphy (special services coordinator, Tempe elementary school district; president, Arizona Education Association) then,

> "the curriculum is going to get so cluttered that young people won't have time to get a well-rounded education." Arizona, at 9.

In the case of free enterprise, the collateral effect of the mandate has had a conservative bias. In Camelback High School, for example, the free enterprise mandate forced the social studies department to drop elective courses in American Problems, Minorities, and Anthropology. Dr. Conrath has heard complaints throughout the state about the necessity of eliminating popular electives in order to satisfy the law.[18]

Eliminating electives is a sure way to lower teacher morale and to help push some teachers into other jobs or occupations. A creative teacher takes great satisfaction in working up a new course in a subject he or she finds interesting. An interested teacher is especially likely to excite and involve his students. By contrast, an imposed, stale course routine will engender the most frustration in bright and energetic teachers, who, generally speaking, are also the ones most capable of leaving the school, the state, or the profession. The same talents that give root to their frustrations give them entree to other jobs, to graduate school, to professional school.

It might be argued that the legislative and state administrative mandates are broad enough to indulge the creative urges of all but the most temperamental teachers. But Free Enterprise simply is <u>not</u> Anthropology, or Minorities, or American Problems. The

heav y load of social studies mandates for Arizona high schools severely restricts the possibilities for substantial excursions into large areas of the social studies, unless local educators are willing to risk putting themselves in violation of the law.

Also, a fixed menu of courses from year to year imparts an atmosphere in the school about the nature of learning, knowledge, and inquiry--one in which "important" or "useful" knowledge is fixed and stable, and in which there is no premium placed on exploration, nor on individual responsibility (of students and educators) to continually reasses what subjects are most important to study.

We do not assume that schools must have varied and changing curriculums. Indeed, in some school communities there will be a broad consensus in favor of traditional subjects and methods of instruction. A parent has a legitimate concern when he wants his child to learn a core of historical facts and social concepts that give the child a relatively stable and re-assuring notion of who he is and what he is a part of; this learning is an operating base in an increasingly confused and fragmented society.

Thus, our point about the "collateral effects" of the free enterprise mandate is not that one kind of social studies instruction is necessarily better than another. Rather, it is to show:

a) The cumulative effect of mandating several courses can be to change the general character of instruction in a

way unintended by the successive majorities of legislators or of Board members which voted in each of the courses.

b) Regardless of the intention of those who promulgate state-wide mandates,

1) the general public may be unaware of the side-effects caused by pre-emption, so the decision-makers are not fully accountable;

2) while the statutes or regulations may be valid on their face, their cumulative impact of limiting local choice may be so severe as to amount to an unlawful invasion of local authority,

CASE STUDY: MAN: A COURSE OF STUDY (MACOS)

In September 1971, Man: A Course of Study (MACOS) was added to the social studies curriculum in the Madison Park School, Phoenix, Arizona. (MACOS is an anthropology course primarily designed for use in the fifth grade, but also suitable for junior high school instruction. A more detailed description appears infra, at 252.) Almost immediately, a group of citizens, backed by a conservative newspaper, began calling for the discontinuance of the course. The district board of trustees held open hearings, debated the matter, and reaffirmed its plan to test MACOS for two years. When the pilot program ended, however, in 1973, the course was dropped.

Although district administrators and officials still considered MACOS an extremely valuable curriculum, their enthusiasm had been sapped by numerous skirmishes stemming from its "controversiality." Meanwhile, the course had not had a chance to win acceptance elsewhere in the state, because the Superintendent of Public Instruction had placed a flat prohibition on purchase of any MACOS materials by any public school in Arizona. He claimed that this ban was within the scope of his authority to ascertain that local purchasing strictly conformed to state textbook listings; it was highly unusual, however, for a Superintendent to intervene so sharply into fringe areas of local curriculum. The order not only prevented interested districts from experimenting with MACOS, but also made it very difficult for Madison Park to continue using the course because it could not purchase replacement parts for materials that were consumed during teaching of the course.

Our analysis of the MACOS-Phoenix dispute has four parts: a chronology of events; a description of MACOS; an evaluation of objections to the course; conclusions. The most important questions we try to answer are these:

What was the quality of the debate and decision-making about using MACOS in Madison Park?

Did a minority impose its curriculum choices on a majority? If so, was there any justification for this result -- for reasons of educational policy? for the protection of individual rights?

Did any participants in the dispute fail to utilize legal remedies that were available to them and which might have changed the outcome of the dispute?

Was the structure of legal authority in Arizona responsible for an inefficient or unfair curriculum setting process?

1. Chronology of events

When school opened in September, 1971, the social studies curriculum for sixth and seventh grade students at Madison Park School was Man: A Course of Study.[1] In the previous term, the board had decided on a two year MACOS pilot program. The county school office and the state routinely approved the purchase of the course materials, apparently without inquiring into their content. Payment was made out of local funds. (Subsequent efforts by State Superintendent Shofstall to tighten up state supervision of local textbooks and instructional aids acquisitions is discussed supra, at 140). Some

Madison Park teachers spent two weeks in the summer of 1971, participating in a MACOS training institute.

When school opened, the Weekly American News published the opening blast in what was to become a two year campaign. The article began:

> "While high school sophomores supposedly cannot survive without sex education, elementary students will be learning this fall that violence, youth and power are necessary for survival."

(September 1, 1971. The reference to a prior dispute about sex education is apparently intended to portray MACOS as the latest attack by a movement which wants to teach immorality in the schools). Two weeks later, the Weekly American began running a series of anti-MACOS articles, authored by Mrs. Phyllis Musselman. Musselman became the chief organizer and spokesperson for opposition to the curriculum.

In less than a month, MACOS was a state-wide issue. On September 23, 1971, Superintendent Shofstall sent a (widely distributed) letter to Superintendent Hatter, advising him to suggest to the objectors that they file a law suit against the district board, and allege that the teaching of MACOS violates the Establishment Clause of the First Amendment. Burton Barr, majority leader of the Arizona House of Representatives, went on the record against MACOS by saying, in reference to the course,

> "Get back to basic education." Weekly American News October 13, 1971.

The first response of local school administrators was to ask everyone to give MACOS a chance, judging it by what went

on in the classrooms and what their children learned. But politicization of the issue soon called for more formal action. Parents were informed that they could:

a. withdraw their children from MACOS and have them take other subjects;

b. have their children bring home any printed material for inspection;

c. come to school to sit in on classes or to view the films (before or after they were shown to children);

d. attend periodic meetings with faculty to discuss the course.

The administration wrote to teachers and staff, renewing its support for the MACOS pilot program.

On October 28, the board held a public hearing. Twelve citizens were permitted to speak in support of MACOS, and twelve against. Also, the board had before it the results of two surveys of parental opinion. Persons favorable to MACOS outnumbered those against it by five to one, and by eight to one.[2] At the end of the meeting the board voted to continue the pilot program as planned. By November 11, parents had removed twenty-two children into optional study.[3]

To the best of our knowledge, no county or state agency conducted a formal proceeding or issued an order banning MACOS from the public schools. The course's critics predicted that it would be a subject of the State Board's November 1 meeting, but MACOS was not discussed. It soon became known to local officials, however, that any new purchase orders for MACOS would not be viewed favorably in the Maricopa County

Superintendent's office or in the Department of Education. This administrative action made it all but impossible for other districts to acquire the course, and it prevented Madison from even purchasing spare parts to replenish important course materials that were consumed during simulation games and other activities.

The drama had ended by January, 1972. Nevertheless, teaching MACOS was subject to distractions that stemmed from the protests, and significant administrative energy had to be expended responding to MACOS-related problems. After completion of the pilot program in Spring, 1973, the program was dropped. According to Dr. Rhoton, the experiment confirmed the belief of teachers and administrators that MACOS was "an exciting approach to the teaching of social studies." However, "emotional outbursts" and other continuing problems made the costs seem greater than the benefits. He thought, too, that many of the learning objectives of the course could be achieved with less controversial materials.

2. What is MACOS?

Man: A Course of Study was meant to be a social studies analogue to the "new math" and the "new science." A team of educators and social scientists undertook the development of a curriculum which could be understood and enjoyed by children, but which was, at the same time, true to the most advanced knowledge in the social sciences. For example, units

on herring gulls, baboons, chimpanzees, and the Netsilik eskimos feature the noted scientific investigations of Niko Tinbergen; Irven Devore; Jane Goodall; Bilicki; and Danish explorer Knud Rasmussen.

The Educational Development Center of Newton, Massachusetts, a non-profit corporation, worked up the course with funding from the National Science Foundation (NSF is a federal government entity). MACOS was the nation's first comprehensive anthropology course for elementary school children. It originated many multi-media concepts, techniques, and materials. After MACOS took shape, some commercial publishers began working on similar curriculums.

MACOS became a darling of educators.

In 1969 it was cited by the American Educational Research Association and the American Educational Publishers Institute as

> "one of the most important efforts of out time to relate research findings and theory in educational psychology to the development of new and bett instructional materials."

Extensive surveys have shown a high level of satisfaction among teachers, administrators, and students who use MACOS.[5] The surveys show that when a district choses to use MACOS, the course usually becomes popular. The surveys do not, however, test the sentiments of persons in districts that have shown no interest in MACOS, or who considered but rejected it.

Until recently, opposition to MACOS was infrequent and localized. Less intense versions of the Phoenix dispute arose in Lake City, Florida; Seattle, Washington; and Houston, Texas. MACOS became a minor national issue in 1975, when the nationally syndicated conservative columnist, James Kilpatrick, let loose a volley of articles attacking MACOS with the same themes that have dominated the Phoenix controversy. (See, e.g. "Is Eskimo sex life a school subject?, Boston Evening Globe, April 2, 1975,at 21; "Bay State fifth grade teacher calls new study system lethal brainwash," Boston Evening Globe, April 2, 1975.) This publicity coincided with the efforts of Rep. John Conlan, of Phoenix, to amend the NSF appropriations bill to prevent funding for the dissemination of MACOS, and to create a congressional oversight mechanism which would make it difficult for similar curriculums to receive developmental funding in the first place. After extensive debate on the House floor, all of the amendments presented by Rep. Conlan and his allies were defeated, some by a very narrow margin.[6]

At the time of this writing, it appears very unlikely that any similar proposals will succeed in the Senate. The Senate Committee report accompanying the bill will, however, have language cautioning the NSF against funding any activities which interfere in local curriculum decision-making.

It is time to say more about the aspects of the course that have provoked these strongly positive and negative

reactions. The organizing theme of MACOS is the problem:

What makes man human?

How did he get that way?

How can he become more so?

In working through the course, children are expected to acquire the concepts, information, and experience necessary for thinking about these fundamental philosophical and scientific questions. They are cautioned against expecting any sure or simple answers. The animal studies introduce these concepts: life cycle; innate versus learned behavior; adaptation; structure and function, communication; social role and organization, conflict resolution; methods of scientific observation. MACOS's showpiece is an extensive study of the Netsilik eskimos. The children are introduced to a genuine eskimo family, and follow it in color films, through a year's migration among seasonal hunting places. Students learn how the eskimos' food and clothing and tools are almost entirely derived from caribou, seal, and fish. They begin to understand the relationship between the Netsiliks' subsistence, migratory life and their social organization, beliefs, and moral dilemnas. Thus, the concepts developed in the animal studies are woven together into the complex notion of culture.

There is no basic textbook. Students acquire information from a variety of sources -- booklets; filmstrips; records; narrated films; non-narrated films (which are treated like fiel trips). An ambitious reader has hundreds of pages to study and

use for research, yet the slow reading child has enough alternative sources for assimilating information, that he can be a full participant in the discussions, role-playing, simulation games, model building, and other projects that are means for developing the concepts. Teachers have found that this variety makes it possible to accommodate different learning styles within the same classroom.

In 1975, MACOS was being used in about 1700 schools.

3. Objections to MACOS

The charges against the course were many and varied. The most frequent complaints are contained in the following list:

(1) MACOS is anti-Christian --
man portrayed without charity, love, beauty

(2) MACOS is anti-Christian --
teaches evolution, that man is just another animal;
teaches the Bible as myth

(3) MACOS teaches cultural relativism.

(4) MACOS justifies violence, senilicide, infanticide, and other immoral forms of conduct

(5) There are lessons which are upsetting and shocking for young children, without compensating benefits.

(6) MACOS lessons encourage disrespect for parental authority and require spying on family members.

(7) It is more important for children to study history and traditional social studies than MACOS.

(8) I don't want my child in any experimental course.

(9) MACOS doesn't teach the basic skills *my* child needs to get a good job.

(10) I don't see what a lot of the MACOS activities have to do with learning. (I went along with the new math, even though I didn't understand it, but I have a pretty good idea of what social studies is all about, and this isn't it.)

(11) MACOS is designed by Jerome Bruner, who did brainwashing in World War II, and by people who believe in the conditioning theories of B.F. Skinner. It is an attempt to brainwash our children.

(12) MACOS is an instrument of the ultra-liberal federal government and the eastern university elitist intelligentsia, which are trying to indoctrinate our children with so-called progressive ideas.

(13) It is illegal to have MACOS in school because it is not approved by the State Board.

(14) The district officials sneaked this course into school without telling me anything about it. That means they probably have something to hide and the criticisms against it are true. And even if they aren't true, I want to show the teachers and school officials that the parents and citizens are in charge.

In their on-the-record statements, anti-MACOS spokespersons stressed themes nos. 1-5, and 11. The tone was sensationalistic. For example, the word "cannibalism" jumps out from several articles; the eskimo story referred to, however, appears only in the teacher materials. In order to drive home the "brainwashing" theme, the critics continually linked MACOS with the famous (infamous?) behaviorist, B.F. Skinner. (Also, they have made unsubstantiated accusations that Jerome Bruner's relatively innocuous wartime intelligence assignments were nightmarish mind control) Actually, Skinner has never had anything to do with MACOS, and his behaviorist theories are very much at odds with Bruner's developmental theories.

Even though the course is not, as it would seem from the criticism, dominated by sex, violence, and cannibalism, the voluminous materials do include films which show the killing

and butchering of caribou and seals, and journals and stories including with frank reference to social/sexual customs. Parents who want their children maximally shielded from such references, regardless of the context, would choose to avoid the participation of their children in MACOS.

Senilicide, one of the harshest practices of eskimo society, is more than mentioned in passing. One lesson features the dilemma of Arfek, who must choose between abandoning his grandmother, Old Kigtak, or slowing the pace of his family's trek and thereby all but assuring that he, his wife, and his children will starve. The family was traveling to a new hunting ground, had little food left and no sure prospects for obtaining more even when they reached their destination. Critics have charged that this lesson teaches cultural relativism. Some parents fear that their children will adopt an unmerciful, utilitarian, ethic -- the end justifies the means, individual rights -- indeed individual life -- must be subordinated to group objectives. There is no objective moral order, no God, only survival. This outlook prepares children to accept -- in their own society -- abortion, eugentics, genocide, senilicide.

A parent could also reach the opposite conclusion, that the lesson heightens the children's moral sensibilities. Before making his decision, Arfek expresses his pain and sorrow, and feels compelled to explain to himself why he has absolutely no choice. This portrayal of universal human emotions contrasts sharply with the final sequence of a movie in the animal

studies —— a limping baboon is silently left behind on the savannah as his troop races for the nightime safety of a wooded area. One aspect of man's humanness, a child might conclude, is that he cares enough about his fellows to do everything possible to help them. In modern society, with its capabilities for muting the onslaughts of nature, doing everything possible means making a tremendous humanitarian effort.

These examples demonstrate two points. First, many of the attacks on MACOS seriously misrepresented the course, making it difficult for parents to reach informed judgments. On the other hand, a person with an intimate knowledge of the course could reasonably consider the course to be morally objectionable. At least one articulate member of the clergy has had serious doubts about the moral content of MACOS.[8] After participating in an intensive MACOS workshop Sister Dorothy Ann, of Tucson stated:

> "My personal reaction to the course was and still is one of frustration because of the utter neglect to have any Christian concept of man -- who he is and where he's going."
> Letter to Rev. Msgr. William Jones, 7/26/70.

A year later, after observing the teaching of the course in Catholic schools, and the reactions of children and parents, her doubts were resolved in favor of MACOS.

> "[W]e as religious teachers have no trouble establishing this course in line with our beliefs because we do not hesitate to put God into this whole picture.
> "[T]his course is so good because it is so open ended. Children are forced to think and evaluate, and here is where the influence of a good teacher takes place." Letter to Dow Rhoton, 10/11/71.

Aside from morality and religion, parents also could reasonably conclude that MACOS was not the best social studies curriculum for their children along the lines of objections nos. 7, 8, and 9. Charges nos. 11-14 are grounded in a conspiracy theory the discussion of which is beyond the scope of this report. (An evaluation of number 6 would also require prolonged and unnecessary discussion.) The purpose of this analysis has been to determine which charges made in the MACOS controversy were fairly debatable. This enables us to decide:

What was the quality of the public debate?

Did the majority viewpoint prevail?

Were minority rights protected?

4. Conclusions

In this subsection we will a) give the short answers to the three questions stated above, b) consider the legal/political actions which could have been but were not taken by the participants in the MACOS dispute, and c) state final conclusions about the effects of legal authority on the dispute.

A. Short answers. From a due process perspective, the high point of the MACOS debate was the three hour hearing conducted by the Madison Board of Trustees on October 28, 1971. Presentations by teachers, parents, residents, administrators, representatives of teacher organizations, and by the director of the MACOS project, brought out every point of view. Petitions and polls showed the weight of opinion in the community, which apparently ran strongly in favor of MACOS.

A drawback of the meeting was that it was held after only three weeks of actual use of the course in Madison School.

This early evaluation had been forced on the board by publicity and protests. MACOS opponents had ample opportunity to press their views upon their neighbors. In addition to their individual efforts, they were given generous coverage in the media, and at least one newspaper took an editorial position strongly against the course.

As far as the local authority of the board could reach, the majority position prevailed. However, subsequent administrative action at the county and state level made it difficult to continue using the course. Even more important, this virtual state ban on purchasing MACOS materials prevented other Arizona public school communities from having the opportunity to test MACOS in their schools and reach their own conclusions about its value. Thus, in the long run, a minority severely disadvantaged the Madison Park majority, and it aborted the formation of pro-MACOS majorities in other districts where the course might have been tested.

It is at least arguable that the minority had a right to overrule the majority. If the board did not, under state law, have authority to offer MACOS in the common school curriculum, then it was proper for the opponents to call that fact to the attention of state officials. While Arizona law is not clear on this issue, we think the local board did have authority to offer MACOS as a supplementary course,[9] and could therefore claim the implied right to have state and county officials approve purchases of the course materials.

Assuming that the board was authorized by Arizona law to offer MACOS, we can think of no valid claim of individual right

by the protesters that would entitle them to having the course eliminated altogether (in the way that the courts banned school prayers), or to have their children removed from that course and given separate instruction. At the very beginning of the protest, however, the principal of Madison Park created the second remedy (opting out) as a matter of policy (and, it might be said, political accountability).

B. Roads not taken

The MACOS dispute had many participants -- pro-MACOS parents and citizens; anti-MACOS parents and citizens; the Madison Park Board of Trustees; the Superintendent of Public Instruction; local administrators; local teachers. There also were some interested by-standers, notably persons in other districts who were considering using MACOS. What any interested party could accomplish depended in part on whether a local district had independent authority to purchase MACOS materials and teach the course. Many conflicting motives were at work, however, and the strategy of each person had to take into account both legal and political considerations.

For example, at the end of its pilot program, the Madison Park Board discontinued MACOS because both the board and its staff wanted to end a source of continuing controversy.[10] Similarly, Superintendent Shofstall had avoided a head-on confrontation with the Madison Park Board by making no attempt to shut down the pilot program. Rather, he acted to prevent purchases in the future by Madison or other districts.

Other persons might have preferred a confrontation. Pro-MACOS parents in Madison Park would want it definitively established that

the board could purchase the materials and give the instruction, so that the board could not use the cloud of illegality as an excuse to give up on MACOS. Meanwhile, people interested in starting MACOS in other districts would have wanted the legal foundation for Shofstall's purchase order ban torn away by a court decision. On the other side, anti-MACOS forces in Madison Park wanted the course stopped immediately. Shofstall advised them to sue the Madison board, claiming that the MACOS course violated the Establishment Clause. However, the Board never took up the MACOS question (even though it was supposedly placed on the original agenda of one meeting), and official action against the course never went further than the ban.

Could these dissatisfied partisans have gotten local or state school officials to have taken more decisive action? Could any of them have brought suit themselves? Although the Madison board would have had to have paid attention to the technical problems of judicial review in Arizona,[11] it could have found a way to get the dispute before a court. The surest route -- though inconvenient in some ways -- was to defy the Superintendent and draw a law suit in which it would be defendant. But getting the board to adopt that course of action would have been a political undertaking.[12]

An interesting problem is whether anti-MACOS persons could have gotten a court adjudication of the legality of the giving of the course under state law.[13] The Arizona courts would probably have denied standing to a private plaintiff, saying it was up to the Board and Superintendent to decide whether the school laws were being enforced, unless the plaintiff had been affected by an action particularly involving its interests. If the board had not permitted opting out of

MACOS, its refusal to let a parent withdraw his child from the course would probably have been a suitable circumstance to give the parent standing. Thus, while it appears that the opting out procedure was originally created out of a sense of fairness, it also had an important legal consequence -- making it more difficult for private persons to sue the board.

Madison Park teachers were generally pro-MACOS. If they had been more committed to the course, to what extent could they have included that issue in their labor relations with the board? If they had struck over the issue, all striking teachers could have had their teaching certificates revoked by the Board for "unprofessional conduct."[14] If they had gotten a collective bargaining agreement with a term providing that the board would take all necessary legal action to try to continue the teaching of MACOS, that term would be unenforceable on statutory grounds,[15] and -- if the issue was reached -- would probably be found to be an unconstitutional delegation of policy-making authority to a private group.[16] In sum, the teachers would effectively be limited to trying -- without applying economic pressure -- to persuade the board to press the matter further.

These examples do not exhaust the political and procedural issues, but they bring out the high points. Now we will analyze the central substantive law question, state v. local authority in the MACOS dispute.

The state prospectively blocked purchase of MACOS materials without moving directly against the teaching of the course in places where materials had previously been obtained. There were two authority questions -- purchase of materials; use of the materials.

The board's most sweeping argument was that MACOS constituted

a "special subject," and therefore the district was directly empowered by the legislature to purchase materials and teach the subject under A.R.S. sec. 15-448(A)(3). In other years, the Supreme Court had held that physical education was a common school special subject which could be given without state authorization; the Attorney General had reached the same conclusion about foreign language instruction.[17] Eventually, the Board adopted both physical education and foreign language as optional common school subjects.[18]

Undercutting this theory was an attorney general's opinion stating that while a district could supplement and enhance the course of study prescribed by the state, it could not implement an additional course of study.[19] This formulation of a rule is one of several attempts made by the Attorney General to interpret the legislative intention in setting up the scheme of state prescription of courses and textbooks. A sure proposition is that the legislature intended for the prescriptions to be a minimum curriculum that must be enforced by each district. The difficult question was to determine how much a district could add to the minimum without contradicting the extent of statewide control contemplated by the legislature. The important balancing formulas that have been advanced are the one just stated -- "enhance but not add an additional course" -- and the rule that the district can purchase teaching aids unrelated to basic textbooks (on its own authority) and supplementary books (with Board permission) so long as they are not used to "supplant" the basic text. The "special subjects" provision, however, is a statutorily-based exception to these rules. As interpreted by the Supreme Court and the Attorney General, it contemplates the teaching of additional subjects. A corollary of that right would be the authority to purchase all necessary materials.

What are the characteristics of the exception, and did MACOS satisfy them? First, considering the ordinary meaning of the term, MACOS was "special" because teaching anthropology to common school children was an uncommon undertaking. Also, the multi-media format of the course was unique, as was the insistence of the curriculum's developers and publishers that it only be sold to districts which sent teachers to MACOS training institutes. Here was a course that was not intended to be "teacher-proof;" in fact, its successful use depended on the abandonment of many conventional teaching habits.

Second, in terms of the general statutory scheme, MACOS was special in that it was the kind of course the legislature intended that local districts should be free to experiment with — so long as the experimentation did not seriously interfere with the local board's duty to carry out the state-mandated minimum format. The legislature delegated the Board authority to determine the basic shape of the ordinary common school curriculum by prescribing subjects and textbooks. If a district offered an additional course dealing with traditional common school subject matter, that would subvert the state-enforced minimum, uniform education. MACOS, however, lay in the fringe area reserved for experimentation by the "special subjects" clause. In order for the Board to win a court order enforcing its ban on purchases and stopping instruction altogether, the Board would have had to affirmatively prove that teaching MACOS prevented Madison Park from satisfying its obligation to teach the prescribed subject matters.

Besides the "special subject" theory, there were other possible legal grounds for the board's purchase and use of MACOS. It could

have been said that this teaching merely enhanced prescribed courses. MACOS lessons could be parceled out for use in other subject areas too -- almost any of them would belong in a science course; the explorations of Knud Rasmussen could occupy several geography classes, many of the booklets and journals could have been used in reading classes; the eskimo stories and myths would be suitable for literature classes; a scale model of the African savannah could have been an arts and crafts project; putting on a production of "The True Play: How Itimagnark Got the Girl He Really Wanted" could have been done in a drama class; and so on.[20] As long as MACOS was not taught as an "additional" course, many of its lessons could still be used without the Board having a right to stop it.

For the district to purchase the materials in the first place, however, would have raised some additional problems. The Board's approval of a purchase order would not be needed for materials fitting into this category: teaching aids unrelated to basic textbooks.[21] However, MACOS would probably not be purchased piecemeal, and it would be hard to characterize such an extensive and integrated set of materials as a "teaching aid." Even though the term, "supplementary book" is not clearly on the mark either, it is a closer description. When the Board has issued a supplementary book list for a subject, purchases of listed books can only be made with Board approval -- it will be given if it is found that the purchase will not supplant the basic text.[22] Where the Board has not adopted a supplementary list,[23] it has been the practice of local officials to ask for Board approval of the purchases anyway. It was by this route that Madison Park got its original rubber-stamped state approval, and it was this route

that Shofstall was closing down by his leak that future orders would be disapproved. If this administrative practice was legally required, then the purchases were successfully blocked (assuming that the special subject exception did not apply). An argument can be made, however, that when the Board has not adopted a supplementary book list, supplementary books can be purchased by a district without Board clearance. The argument is stated in our chart of textbook adoption powers, supra at 124 . If a court accepted the argument, MACOS materials could be purchased as supplementary books for subjects not having supplementary book lists.[24]

In summary, the Madison Park district had a strong case that MACOS was a "special subject" which it had independent statutory authority to offer. If that theory failed, it could have stitched together some bits of discretionary authority in the textbook purchase law adoption procedures. Its authority to purchase might ultimately have depended on a rather obscure distinction between Board approval powers when there is a supplementary book list as compared to when there is not one.[25] During the writing of this report, the state agency personnel and policies have been changing. In a future MACOS dispute, the lines could be differently drawn. For example, the Board and Department might not want to adopt MACOS as a prescribed or optional subject, yet still be open to the idea of letting districts that have seriously considered the pros and cons of the course make use of it. If anti-MACOS persons objected that such an ad hoc waiver was not within the authority of the Board, the Board could rely on the authority of the recent amendment to A. R.S. sec. 15- 102(18), which

permits it to approve a local application to substitute a different text for one of the 3-5 on the state list for that subject. Since adoptions last five years, the waiver procedure also limits the extent to which a previous Board can limit the discretion of subsequent Boards. To complete the scenario, the Board could approve the application of Madison Park to substitute MACOS for one of the prescribed texts in Science. For this to be a proper exercise of the Board's powers, however, Madison Park would have to show its intention and ability to see that all of the science concepts in the prescribed course of study for the relevant grades would be taught, using MACOS and other materials.

C. Conclusions

We have already stated three conclusory points --

a) The MACOS debate was fairly conducted at the local level, but nevertheless was relatively low in quality because attention was directed away from the most substantial objections to the course by incorrect and misleading charges.

b) The majority prevailed at the local level but a minority managed to get an overriding decision from the Superintendent.

c) No individual rights were violated by the use of MACOS in Madison Park; turning the course into an elective made this conclusion especially clear.

We will now examine the relationship between these conclusions and Arizona's legal arrangements for curriculum control.

In a non-litigious state like Arizona, the precise application of curriculum law to a given subject can be less important than the

political currents that general perceptions of the law set in motion. No Arizona court ever decided whether local districts could have purchased MACOS materials without state permission, or whether the state could have immediately put a stop to MACOS instruction in those schools already owning the materials. Given the relatively centralized system curriculum control in Arizona, the Superintendent's ban on future purchases was plausibly legal, even though we think a careful analysis of all of the applicable laws would point to the opposite conclusion. Madison Park acquiesced in the decision. The Superintendent had enough political acumen not to try to stop the course altogether, an action that would have probably provoked the board to appeal to the courts. Whether or not the Superintendent's ban would have held up in court, the centralized Arizona curriculum system provided enough color of authority for him to decisively block the spread of MACOS in Arizona.

Madison Park's decision to drop MACOS after two years, and the reluctance of other districts (which might have contemplated using the course) to get involved in the dispute, illustrate the political use of controversiality. That is, to stop a program it often is unnecessary to show its lack of merit in any objective way -- if one can merely make the program "controversial" there is a good chance both politicians and bureaucrats will back off from it. Besides the energy they save by avoiding rather than resolving the problem, the officials satisfy those parents who, without involving themselves in the details of curriculum debates, feel better if what their children is being taught is not "controversial." The Arizona Supreme Court has held that a teacher's controversiality (if the teacher did not <u>try</u> to be controversial) is <u>not</u> by itself "just cause" for dismissal.[26]

Courses, however, can be discontinued without just cause.

Curriculum law increased the controversiality of MACOS in at least two ways. First, the apparent availability of intervention by state authorities encouraged the anti-MACOS forces to make as big an issue of the course as possible, and to persist in their campaign of publicity and opposition even after losing in opinion polls and in a board decision following an extensive and fair public hearing. Second, the Superintendent's ban turned the continuing pilot program at Madison Park into a lame duck project, and opponents knew they could get rid of it altogether if it continued to be a source of irritation for local officials.

The state crack-down on purchasing certainly lowered the quality of debate in Arizona about this important curriculum experiment. Although there were substantial reasons for a person to not want his child in MACOS, opponents focused the debate away from these complex and difficult considerations onto sensationalized factual inaccuracies. The repeated attempts to lin MACOS to B. F. Skinner, and to link Jerome Bruner to "brainwashing," was designed to tap the fears, resentments, and frustrations of many parents and citizens who felt that technology and federalism had already invaded their family lives.[27] In Madison Park, what most effectively neutralized opposition to MACOS was its actual use -- parents were pleased by the reactions of their children to the course; it's simple for them to inspect the MACOS materials, and they could listen to tapes of classes or their children could explain how the materials were used. The purchase ban took away from educators and parents who liked MACOS the most effective way of showing its worth -- experience.

The low quality of debate may also have been a consequence of what we have called the "capture effect." The Superintendent and Board appeared to have the power to strike out MACOS state-wide, overhauling local districts. MACOS opponents probably were aiming to capture those levers of control. Perhaps their criticisms were more designed to create symbolic issues that would catch the favor of state officials, than to convince their neighbors, who had a first-hand familiarity with MACOS, that the course was bad.

The most striking and disheartening fact about the role played by state educational institutions in the MACOS dispute, is the contrast between the decisive impact of the Superintendent's intervention in the dispute, and the <u>total lack</u> of any substantial participation by state officials in public evaluations of MACOS. The Superintendent had (or so it seemed) the power to act unilaterally and without reasoned explanation; he so acted and that was it. If reducing the powers of state education agencies would force them to rely more on persuasion and substantive problem-solving, and less on sheer domination, that change would undoubtedly raise the level of curriculum decision-making in the state. Carrying out responsible innovation in the public schools is a difficult task. It takes the cooperation of local and state institutions. If any of these ducks the substantive issues involved, not much improvement is likely to result.

The pressures on innovating districts were aptly described by Phillip R. Fordyce, who was Dean of the College of Education of Florida State University when MACOS was a controversial issue in Lake City, Florida. He wrote, in 1970:

> "The issue at Lake City cannot be dismissed as merely a local matter. As the record indicates, teachers and administrators tend to be apprehensive and often prone to impose sanctions on themselves when such issues as that at Lake City become public knowledge. Other schools in Florida tend to lose their enthusiasm for curricular reform in these sensitive but critical areas."

The occasion for his comments was a letter to the director of curriculum instruction of the Florida Department of Education. He was criticizing the Department for failing to send observors to crucial Lake City meetings at which MACOS was being evaluated. It appears that the Department had indorsed the general idea of curriculum innovation, but had shown no appetite, in this case, for undertaking some of the difficult leadership responsibilities it entailed. Fordyce commented:

> "(A) serious question has arisen at Lake City in the minds of some citizens regarding the dissemination of materials developed by Jerome Bruner and other scholars of impeccable credentials at the Educational Development Center. I believe the State Department has an obligation at least to become informed first hand about the dimensions of this issue. I had hoped that the department would play a constructive role in resolving the conflict, for as the history of American education reveals, schools are highly vulnerable to pressures which undermine professional autonomy and adversely affect the morale of teachers and impair the opportunities of pupils to learn." [28]

In Arizona, the state education agency compounded the fault of Florida's. Not only did it fail to contribute anything to promoting an understanding of the content, objectives, advantages and disadvantages of MACOS; by imposing the purchase ban it acted under the color of Arizona's centralized scheme of curriculum law in a way that cut short the possibilities for constructive dialogue within the districts which might have otherwise purchased the course.

END

FOOTNOTES:

[1]The Attorney General has said that the constitutional objective is to promote an educated citizenry. The context of the statement was an opinion holding that persons over the age of 21 years could be admitted into the public schools. Att'y Gen. Op. 59-15 (1959).

[2]San Antonio Ind. S.D. v. Rodriguez, 411 U.S. 1 (1973).

[3]For example, Senate Bill 1300 (February 1974) would have transformed the prescriptive powers of state officials over courses textbooks, and qualifications for non-teaching personnel into recommendatory powers (the Board would retain authority to prescribe qualifications for teaching credentials). If challenged as a violation of the Article 11 "uniformity" requirement, the new arrangement would probably be upheld, since the mix of mandatory and recommendatory powers still generated effective statewide standards.

[4]Common schools include grades 1-8, high school covers 9-12.

[5]351 U.S. 12 (1956).

[6]Hart v. Bayless Investment and Trading Co., 86 Ariz. 379, 346 P. 2d 1101 (1960).

[7]Article 4, pt. 1, sec. 1.

[8]Article 8, section 1.

[9]We sent a questionnaire inquiring about use of initiative, referendum, and recall, to the Secretary of State's office (which would handle petitions pertaining to actions by statewide officials), and to each county school superintendent (they are charged with administering special local school elections). The response rate was low; those answers that were received reported little or no use of these procedures in recent years. (The low response rate says something about the efficiency of county superintendent offices.)

[10]If,however, the committee had been created by statute and appointed by the Board, its exercise of final adoption powers might be considered a delegated power from the legislature rather than a subdelegated authority from the Board.

[11]In some cases it might be significant that their members are appointed rather than elected.

[12]A.C.R.R. R7-2-301, p. 71; See also A.C.R.R., R7-2-302, p. 109, "Parental Involvement."

[13]A.C.R.R. R7-2-301, p. 76-7; A.C.R.R. R7-2-302, p. 108-9.

[14]In voting rights cases, similar arguments are based on the Equal Protection Clause.

[15]The relevant provision in the Arizona Constitution is Article III, "Distribution of Powers," which reads:

> "The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

[16]One does not get so far as applying the test if the advisory role theory is found to apply, because then there is said to be no delegation.

[17]18 Ariz. App. 246, 501 P.2d 422 (1972).

[18]In Kramer v. Union School District, 395 U.S. 621 (1969), it was held that a childless elector who did not pay property taxes (not even indirectly as rent) had as much right to vote in a school election as anyone else.

[19]The by-laws provide that when a student transfers to a high school in a district where his natural parents do not reside, he is ineligible for competition for two semesters. The purpose of the regulation is to remove the incentive for coaches to shop around for athletes, having them transfer to their schools.

The by-laws recognized some exceptions to the general rule, covering situations where athlete shopping was not involved. For example, when the student's parents live outside the district, but he is living with his legal guardian within the district, the student is eligible <u>if</u> his natural parents

> "have been legally declared incompetent, AS STATED ON THE COURT ORDER." Rule 10, par. 8, AIA 1974-1975 Handbook.

Quimby's situation did not quite come under the literal reading of this rule, but it certainly had similar factors operating. A court ordered Quimby to be committed to a reform school unless he should leave the county where his parents then resided and return to Coolidge, Arizona, where he previously had attended school. Pursuant to the order, Quimby returned to Coolidge, where he lived with friends of his parents, who became his guardians. There could not be a clearer case of a student transfer that was unrelated to coach-student collusion or other competition related motives. Nevertheless, the AIA Board ruled that the exception did not apply and Quimby was ineligible, a ruling accepted by the school.

19A 31 Ariz. 503, 254 P. 1056 (1927).

[20]Letter, H.A. Hendrickson, AIA Executive Secretary, to Arthur Block, 8/16/74; telephone conversation with AIA staff person, 8/74.

[21]We think Quimby was denied due process, because he was entitled to an individualized hearing on the underlying issue of whether his return to Coolidge was even arguably sports-motivated; as it was, he was victimized by a conclusive presumption that because his parents remained behind he had moved in order to play on the Coolidge team. Alternatively, it should have been found that the different treatment of students whose parents have been declared incompetent by a court, and students who have been ordered to go to a particular school district regardless of where their parents live, is not rationally related to a legitimate state end. Therefore, so long as the AIA rules made the former class of persons eligible, they also had to allow the latter class to compete.

[22]But as we said in a preceeding footnote, we think Quimby should have prevailed on his equal protection claim or on a due process claim, insofar as the particular AIA ruling in this case was concerned.

[23]Camerena v. Department of Public Welfare, 9 Ariz. App. 120, 449 P. 2d 957, vacated 470 P. 2d 111, 106 Ariz. 30 (1969); State Personnel Commission v. Webb, 18 Ariz. App. 69, 500 P. 2d 329 (1972); State v. Arizona Mines Supply Co., 107 Ariz. 199, 484 P. 2d 619 (1971); Wells-Stewart Construction Co. v. Martin Marietta Corp., 103 Ariz. 375, 442 P. 2d 119 (1968).

[24]Conflicting provisions would, of course, have to be repealed or amended if thorny problems of statutory interpretation were to be avoided.

[25]Part (A) in our delegation analysis.

[26]Part (C) in our delegation analysis.

[27]Under current law, this agreement would be struck down as a matter of statutory law, without reaching the constitutional delegation issue. Scottsdale, supra.

[28]Again, this arrangement is ultra vires as a matter of non-constitutional Arizona law at the present time.

[29]Article 2, sec. 8.

[30]For example, as part of a language arts autobiography or a lesson on social roles. Also, the Board's sex education guidelines state that the course shall

> "Not invade the privacy of the student by including test, psychological inventories, surveys or examinations containing any questions about the student's or his parents' personal beliefs or practices in sex, family life, morality, values, or religion;"

[31]See, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status, A Nonconstitutional Analysis," 117 U. of Penn. L. Rev. 373 (1969) and "Reflections on Developing Trends in the Law of Student Rights," 118 U. of Penn. L. Rev. 612 (1970).

[32]The First, Fourth, Seventh, and Eighth. See citations at 504 P.2d at 922.

[33]504 P. 2d at 926.

[34]504 P.2d at 924, referring to the Ninth Circuit decision in King v. Saddleback Junior College District, 445 F.2d 932 (9th Cir. 1971)

[35]A "letterman" testified that students talked about the students talked about the plaintiff's hair, and that some would like to cut it.

[36]504 P.2d at 927.

[37]This statement assumes that resting the Pendley holding on the disruption theory did not fit the facts in that case.

[38]Article 2, sec. 1.

[39]Article 11, sec. 7.

FOOTNOTES

[1]A.R.S. sec. 15-102(16).

[2]A.R.S. sec. 15-1025; quoted in part infra at 232 .)

[3]A.R.S. sec. 15-1011 et. seq.

[4]A.R.S. sec. 15-1012(4).

[5]A.R.S. sec. 15-1015(D).

[6]A.R.S. sec. 15-1012(D).

[7]A.R.S. secs. 15-1012-1014.

[8]For example, no suit was filed in the recent disputes about the curriculum commissions, the free enterprise course, and Man: A Course of Study.

[9]An example of an informal opinion would be a school trustee asking the county attorney, off the record, what he would be likely to conclude about the law pertaining to a particular issue, and being told "you'd be clobbered on that one."

[10]A detailed analysis of this grant is contained in section three of this report, "State Agencies."

[11]E.g., in Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056 (1927), the court relied on the phrase, "other special subjects" in A.R.S. sec. 15-448(B)(1); elsewhere there occasionally appears dictum to the effect that local powers can be implied from the legislature's creation of a system in which local educators bear the brunt of planning, implementing, and supervising public school instruction.

[12]Board of Education of Scottsdale H.S. District No. 2212 v. Scottsdale Ed. Assoc., 509 P.2d 612 (1973).

[13]A.R.S. sec. 15-471.

[14]Compare paragraphs 16-18 to paragraph 19, in A.R.S. sec. 15-102.

[15]"Special Education of Exceptional Children," Laws 1970, Ch. 169, amended Laws 1971, Ch. 184.

[16]A.R.S. sec. 15-1011(3)(e).

[17]A.R.S. sec. 15-1011(3)(b).

[18]A.R.S. sec. 15-1011(3)(a).

[19]A.R.S. sec. 15-1011(3)(h).

[20]A.R.S. sec. 15-1011(3)(g).

[21]A.R.S. sec. 15-1011(3)(d).

[22]A.R.S. sec. 15-1011(3)(f).

[23]A.R.S. sec. 15-1011(2)(c).

[24]A.R.S. sec. 15-1011(2).

[25]A.R.S. sec. 15-202, secs. 15-1097-99.

[26]A.R.S. sec. 15-321(B)(3).

[27]A.R.S. sec. 15-321(B)(1).

[28]A.R.S. sec. 15-321(B)(6).

[29]A.R.S. sec. 15-321(B)(2).

[30]A.R.S. sec. 15-321(B)(7).

[31]R. Berenger, "Career Education: How Big a Change?" 9 Compact 2 (June 1975).

[32]A.R.S. sec. 15-1021.

[33]A.R.S. sec. 15-1023.

[34]A.R.S. sec. 15-1024.

[35]A.R.S. sec. 15-1031.

[36]A.R.S. sec. 15-1025.

[37]A.R.S. sec. 15-102(17).

[38]A.R.S. sec. 15-1071.

[39]A.R.S. sec. 15-1041.

[40]A.R.S. sec. 15-1097.

[41]A.R.S. sec. 15-1011 et. seq.

[42]A.R.S. secs. 15-1015(A)(4), 1051, 1199, 102(17).

[43]9 Compact 2, at 2-3 (June 1975).

[44]"Career Education - Fad or Fundamental," December 6, 1973, p. 9.

[45]"Career Education," supra, at 11.

[46]"Career Education,"supra, at 5.

FOOTNOTES

[1]Several board members complained in late 1973 that they were unable to get adequate assistance from the Department when they were researching issues on which their views were known to be contrary to those of the Superintendent. They proposed the appropriation of funds to create an educational information office within the Department which would be under the Board's direct control. Phoenix Gazette, 12/6/73.

[2]Prominent in this group was the Superintendent, Weldon Shofstall (who retired in 1974); Shofstall, whose speeches and public statements represent very orthodox conservative viewpoints, distinguished his ideas from the conservatism or most activist faction on the Board, saying the members of that faction were "radical right-wingers." Arizona Republic, 12/4/73.

[3]In New York, by comparison, the Board of Regents can fire the Commissioner. Obviously, frequent use of this prerogative would make a shambles of the state's activities. The potential for its exercise, however, makes clear that the Regents can have the final word on any issue which is important enoguh to warrant undertaking the task of replacing the Commissioner.

[4]A.R.S. sec. 15-102(12). The Superintendent would defend the action on the grounds that the act or omission in question did not involve a ministerial duty of his, but rather that the laws gave him discretionary authority to decide as he did.

[5]Op. Att'y Gen. 69-4-L.

[6]The "White Paper" of the Arizona Coalition on Educational Policy states: "In 1972, SB 1160 was signed into law, providing $35,000 for the State Department of Education to study and recommend a plan for school district boundary reorganization. On January 4, 1973, State Superintendent Weldon Shofstall indicated his intention to divide Tucson District 1 enrollment in half. This district is one in which resistance to some of . . . Shofstall's proposals has been especially strong."

[7]The Board is not a legal entity which can sue and be sued. Members can be sued to correct acts taken in their official capacities, but they are immune from personal liability for good faith conduct. A.R.S. sec. 15-101(D).

[8]As yet, no compensation statute has been passed.

[9]The change in Board membership resulting from the election of Superintendent Warner, and an appointment by newly elected Governor Castro, in early 1975, stymied these plans.

[10]See also Op. Att'y Gen. 61-53-L and Op. Att'y Gen. 58-47.

[11]There was also a procedural issue in the case pertaining to the scope of judicial review. Kimball had been given a hearing before the Board. When he subsequently obtained judicial review, he sought to introduce new evidence in the trial court. He was refused. Before the appeals court, he argued that he had had a right to a trial de novo in the trial court either under A.R.S. sec. 15-255; or under the Judicial Review of Administrative Proceedings Act (JRA), A.R.S. sec. 12-901 et. seq. The appeals court rejected both claims: a) sec. 15-255 only applies to judicial review of contract disputes between "continuing teachers" (a term defined in the Teacher Tenure Act so as not to include superintendents) and local governing boards. (Note: sec. 15-255 was superceded by sec. 15-264, which was added in Laws 1974, Ch. 60.); b) the JRA only provided for de novo review if the administrative hearing had not been stenographically recorded. A.R.S. sec. 12-910(B). Kimball's hearing had been recorded.

[12]Phoenix Gazette, 10/9/73.

[13]Laws 1974, Ch. 60.

[14]Assessment and evaluation reports can be used by administrators in personnel matters and in hearings relating to such matters; they also can be introduced in evidence in any court action between the board and the teacher if the competency of the teacher is at issue or if the report was an exhibit at a prior hearing.

[15]A.R.S. sec. 15-448, provided in part:

> "B. The [local] board may:
> 1. Employ special teachers in drawing, music, domestic science, manual training, kindergarten, commercial work, agriculture and other special subjects." (emphasis added)

See, Alexander v. Phillips, 31 Ariz. 503, 254 P. 1046 (1927).

[16]A.R.S. sec. 15-1025(A).

[17]Earlier drafts of recommendations that were prepared by the social studies and science curriculum commissions included detail on the lesson plan level. However, the Board did not adopt on a mandatory basis any such detailed course of study. Some commissions bowed to public pressure and revised their reports to read like general syllabi; when one commission persisted in drawing up a detailed document, the Board stated that the detailed parts would only have the force of recommendations.

[18]In New York it appears that the Board of Regents, under the New York Education Code sec. 3204, has some power to modify statutorily enacted curriculum requirements.

[19]Laws 1974, Ch. 146.

[20]Att'y Gen. Op. 61-16, at 29 (1961), [emphasis added].

[21]A.R.S. sec. 15-102(15), the Board; sec. 15-422, local boards; sec. 15-201, teachers.

[22]Par. 15: "Prescribe and enforce a course of study in the common schools." Par. 16: "Prescribe the subjects to be taught in all common schools."

[23]San Antonio v. Rodriguez, 411 U. S. 1 (1973).

[24] Lau v. Nichols, 414 U.S. 563 (1974)

[25]Wisconsin v. Yoder, 406 U.S. 205 (1973).

[26]Of course, the resulting difference in treatment must not be a violation of the Equal Protection Clause.

[27]In West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) pupils of the Jehovah's Witnesses faith were excused from reciting the Pledge of Allegiance.

[28]380 U.S. 163 (1965).

[29]Seeger was a conscientious objector case.

[30]A similar question is whether the free enterprise course could successfully be attacked as an establishment of religion, or an excessive burden on free exercise. See infra, at .

[31] 262 U.S. 390 (1923)

[32]The problem of ensuring "fair" treatment of different points of view has been a subject of intense controversy in the area of broadcasting, e.g. right of reply laws, equal time laws, and the Federal Communication Commission's FAirness Doctrine.

[33]A.R.S. sec. 15-102(14).

[34]See Att'y Gen. Op. 69-17-L (1969). The Attorney General reached this conclusion in a similar situation. Asked about sex education, he said:

1) The common school board did not have independent authority to establish a sex education course.

2) The Board could prescribe sex education as an optional (or mandatory) course.

This express authority created an implicit power in the Board to adopt binding guidelines limiting subject matter, material, and grade level for the course.

[35]The legislature has delegated to governing boards the primary role in determining high school curriculum. A.R.S. sec. 15-545(B) states:

> "The [local] board shall prescribe the course of study for the high school, subject to approval by the state board of education."

[36]Another problem raised by this rule is defining the amount of classwork pertaining to Marxism which triggers the condition. Certainly, brief references could be made to the subject without the teacher having to go into a digression about critiques of Marxism.

[37]However, the condition could still be struck down if it were proved that the intention and effect of the condition was to further a constitutionally impermissible purpose, such as the establishment of religion.

[36]A typology of curriculum committees appears on P. 108 .

[37]A.R.S. sec. 15-1202.06.

[38]A.R.S. sec. 15-1201, and 15-1202.03(C). 7% applies to the 1974-1975 fiscal year. The legislature reviews the figure each year, after receiving a report from the economic estimates commission.

[39]See .A.R.S. sec. 15-1202.07, which provides that at least 10% of the electorate must vote in the election for it to act as an approval. This section does not have the force of law, however, until a parallel state constitutional amendment is passed.

[40]As constituted before membership changes resulting from the November 1974 election. In January 1975, a moderate, Raul Castro, became governor and appointed a moderate Board member; at the same time another moderate, Carolyn Warner, became Superintendent of Public Instruction and an ex officio member of the Board. The campaigns of Warner and Castro had backing from professional educator organizations. 1 Arizona Educator Advocate No. 9, p. 2 (March 2, 1975).

[41]Att'y Gen. Op. 72-27-L, at 103 (1972).

[42]Phoeniz Gazette, Oct. 9, 1972 Shofstall opposes Board's "out of habit" rejection of several federal-local grants; Arizona Republic, Oct. 22, 1972 (editorial backing the Board's position); Phoenix Gazette, Nov. 7, 1972 (Mesa school superintendent criticizes Board but says he will not sue Board, but press for legislative withdrawal of Board approval powers. [No such legislation was passed.]).

[43]Some of the Board members' comments: "Why don't you have a hippie up there burning the American flag?" "The peace sign? Isn't that the footprint of the American chicken?" Phoeniz Gazette, Oct. 22, 1973.

[44]Quotation from first version of social studies commission report (Written before public hearings). Arizona Republic, 11/15/72.

[45]A.C.R.R. R7-2-201; Arizona Republic 2/14/73.

[46]Like many publications of the Department of Education, it is undated. It probably was first issued in Spring 1974.

[47]Arizona Republic, 3/1/73, 1/23/73.

[48]e.g. S.B. 1300 (1974).

[49]Arizona Republic 10/5/73.

[50]Arizona Republic, 11/1/73. "Basic goals boards retreat a little."

[51]Arizona Educator Advocate, March 1973.

[52]Arizona Republic, 2/1/73.

[53]Phoenix Gazette, 4/13/73.

[54]Arizona Republic, 3/29/73.

[55]Arizona Republic, 1/24/73.

[56]S.B. 1079; Phoenix Gazette, 2/15/74.

[57]Arizona Republic, 3/4/73.

[58]Arizona Republic, 4/14/73.

[59]Arizona Republic, 11/27/73.

[60]The changes are the results of appointments by Gov. Castro, and the election of Superintendent Warner. Castro and Warner were elected in Nov. 1974.

[61]Phoenix Gazette, 2/24/75.

[62]Arizona Educator Advocate, 3/3/75, at 2.

63 The Board has adopted the following common school courses:

Ch. 2 STATE BOARD OF EDUCATION R7-2-301

Subjects to be Taught	Years Taught	Optional Subjects
Arithmetic	1-8	Manual Training (statutory)
*Geography	1-8	Household Economics (statutory)
*World History	1-8	Arts and Crafts
*/**Ariz. History & Constitution	7-8	Band
*/**American History	7-8	Chorus
*/**Civics (U.S. Constitution)	7-8	Foreign Language
***Handwriting	1-8	Journalism
***Language	1-8	Physical Education
***Reading (including phonics)	K-8	Typing
***Spelling	1-8	Drama
Literature	6-8	
Health	1-8	
Science	1-8	
Music	1-8	

[64]Answers to interpretive problems:

1. a. It can be purchased as a teaching aid related to the basic textbook (if such a relationship can be shown). Can be budgeted as CO to the extent the cost falls within the 25% limitation.

b. Can be purchased as teaching aids unrelated to textbooks, but then budgeted as M & O.

c. In both of above cases, the amount of use is too small to support a finding that the materials are being used to supplant the basic text.

footnote 64 (cont.)

2. This is a pure supplantation question. Under Superintendent Shofstall's review procedures (March 1974), the deputy superintendent would approve the purchase if he was satisfied by assurances that the book would only be used extensively by students who had mastered the basic book. Under such conditions, even though the basic text would not be used much, (because quickly mastered by these students) one could not say it was supplanted.

3. There is no supplantation problem because the materials involved are clearly secondary instructional tools. The question is whether they can be classified as teaching aids "related to textbook" and therefore fit under the CO budget. Even though they are put out by a different publisher, they should be considered "related" so long as they amplify the content of the basic text (as opposed to introducing and developing new topics or contradictory ideas.) Of course, the 25% exemption limit applies.

4. Booklets may be purchased so long as within sphere of subject of journalism, and don't amount to adding an unauthorized subject. Budget category is M & O.

5. Teaching anthropology to common school children is unusual enough that it should be considered a "special subject." Local discretion over content is complete except where Board can find independent basis for interference. Budget — M & O.

[65]Prescribed by statute or Board regulation.

[66]The Board has not issued supplementary book lists for most optional courses. However, local officials still ask for approval for purchases, as if sec. 15-1101(B) applies even when there is no list. This may be a mistaken view of the law, see Figure 1, box F.

[67]Of course, the Board may amend the report before adopting it, or reject it altogether. In at least one case -- social studies — the Board adopted a committee report but only on a recommendatory basis. That is, it did not become binding on the local districts as a curriculum syllabus. Arizona Republic, 11/27/73. The functions of the textbook and subject matter committees are outlined on pages 108-9. the regulations governing the committees are printed (in their entirety) at several places in the Board's regulations. See, e.g. A.C.R.R. R7-2-201.

[68]At p. 68 of 1975 Secretary of State edition. The Board adopted the policy, 7/24/73.

[69]The comparisons are made after an adjustment for the number of pupils in average daily attendance.

[70]After 1974-1975, the allowable per cent increase will be determined by the legislature after receiving recommendations from an economic estimates commission. A.R.S. sec. 15-1202.03.

[71]The legislature conditionally enacted a statute further requiring that at least 10% of the eligible electors vote in the election. The condition is passage of an enabling state constitutional amendment. A.R.S. sec. 15-1202.07.

[72]Also, the figure has a symbolic force -- staying within it suggests to constituents that the board members have been good managers of the district's finances.

[73]A.R.S. sec. 15-1101(B). Of course, if the item has been adopted by the Board as a supplementary book, it is difficult for the local board to treat it otherwise. Consequently, the point made here only applies to the situation where a board is considering following the administrative practice of asking the Board for permission to purchase an unlisted material which could be classified as a supplementary book.

[74]A.C.R.R. R7-2-301, p. 80.

[75]"Supplementary Textbook Approval Procedure, 25 March 1974".

[76]We noted above that it is administrative practice for districts to ask for approval when there is no list, but that the practice may not be legally required. See supra, at 124, 132

[77]See . supra at 108 .

[78]Under the JRA, and perhaps under other laws if proper standing is maintainable, which is more likely when the decision results in a cut-off of state funds.

FOOTNOTES

[1]See the majority position in Burnkrant v. Saggau, infra; the dissenting judge wanted to dismiss the complaint for failure to exhaust administrative remedies, because he thought the school board had a duty to hold a hearing on the dispute if so requested by the plaintiff.

[2]Burnkrant v. Saggau, 12 Ariz. App. 310, 470 P.2d 115 (1970).

[3]A.R.S. §12-902(A); also, this section specifically mentions the Department of Public Welfare.

[4]12 Ariz. App. 77, 467 P.2d 917, supplemented 12 Ariz. App. 228, 469 P.2d 120 (1970).

[5]Interview with Assistant Attorney General Ralph Wiley, July 1974.

[6]5(c)(1); see page 196 of the Policy Book, with pagination as originally filed.

[7]The DJA is discussed more fully infra.

[8]Unless the Act does not contemplate suits among governmental agencies and political subdivisions. The district could avoid this problem by having a local parent/citizen/taxpayer join in its petition to the Board, and in its JRA complaint. What if the Board refuses to make the private person a party to the administrative hearing -- is that decision denying joinder or intervention itself reviewable under the JRA?

9 Art. 11, §6. This is a fairly oblique reference, since the quoted clause refers to state educational institutions, and was probably drafted with tuition at state universities in mind.

10 But see, State Board of Technical Registration v. McDaniel, 326 P. 2d 348 (1958), in which the court held--under unusual circumstances--that the remedy of appeal was inadequate;

11 Pendley v. Mingus Union High School District No. 4 of Yavapai County, 109 Ariz. 18, 504 P.2d 919, at 926 (In Bank 1972).

12 Tucson Public Schools District No. 1 of Pima County v. Green, 17 Ariz. App. 91, 495 P. 2d 861 (1972).

13 Id.

14 Secrist v. Diedrich, 6 Ariz. App. 102, 430 P. 2d 448 (1967).

15 Schade v. Arizona, 109 Ariz. 396, 510 P. 2d 42 (1973).

Delay in adjudication of a JRA action caused by a general backlog in the courts does not make that action, per se, an inadequate remedy. Rhodes, supra, 373 P.2d at 353.

FOOTNOTES

1. A.R.S. sec. 15-445.

2. A.R.S. sec. 15-1202.01.

3. e.g., Lockhart, and see supra at .

4. See, School District No. 1 of Pima County v. Lohr, 17 Ariz. App. 428, 498 P.2d 512 (1972), suit against county school superintendent.

5. The legislature balked at enacting such a law. One concern was whether the change could undermine the state's anti-teacher unionization policy. There was also a general fear of the unknown--unless the hundreds of statutes were redrafted, there was no telling how the shift in presumption might make scores of provisions read in ways that belied the original legislative intent. That could leave it up to the courts to decide, in many instances, whether the legislature, in adopting the permissive presumption, intended to override its (alleged) original intention. Stephen Sugarman interview.

6. A recent statute requiring school committees to provide and substantially pay for designated services for children with special needs was widely decried as a violation of customary local autonomy. M.G.L. St. 1972, c. 766.

7. Alexander V. Phillips, 31 Arizona 503, 254 P. 1056 ( ), Atty. Gen. Op. 61-16 (1961).

8. A.R.S. sec. 15-1302; Op. Atty. Gen. 58-77 (1957); Op. Atty. Gen. 70-6-L (1970).

9. See A.R.S. sec. 15-1201, et. seq. [Supp. 1974], and especially secs. 15-1201, 1201.01(A), 1202(G-I), 1202.01(A and D), 1202.02, 1202.03, 1202.06, 1202.07).

10. A.R.S. sec. 15-102, paras. 20-23; see section III(B).

11. Department of Education Files

12. See e.g., Handlin and Handlin, Commonwealth; a study of the role of government in the American economy: Massachusetts, 1774-1861 (1969).

13. About one in five is Mexican-American; one in twenty Indian. There are at least fourteen different Indian tribes who speak different languages. Shofstall, "Bilingual-Bicultural Education," 3/22/74.

FOOTNOTES

[14]For a more detailed discussion of the bilingual and ESL models, see T. van Geel, "The Right to Be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans," 25 Syracuse L. Rev. 863, at 873 ftn. 30 (1974).

FOOTNOTES

[15]On the interpretation of "good cause," see also, Board of Education, Tucson High School District, No. 1 v. John Williams, 1 Ariz. App. 389, 403 P.2d 324 (1965), and Palick v. Ruth Fisher School District No. 90 of Maricopa County, 13 Ariz. App. 5, 473 P.2d 807 (1970).

[16]Letter of Dix Price, Executive Secretary, Arizona Education Association, to John Mulkey, Glendale Teachers Assn., March 3, 1975.

[17]Joe Stocker (Arizona Education Association) letter, 3/17/1975.

[18]A delegation of teachers from Casa Grande Union High School District testified to that effect at a House hearing on a PN bill. Arizona Educator Advocate, May 27, 1975, p. 1.

[19]The recent decisions of the highest courts of New Jersey and Maine, in which the state constitutionality of delegation of legislative powers to unions and arbitrators was questioned, involved disputes about binding arbitration. See Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17, 311 A.2d 737 (1973), and City of Biddeford v. Biddeford Teachers Association, Me., 304 A.2d 387 (Supreme Judicial Court, 1973).

[20]United Steelworkers v. Warrior and Gulf, 363 U.S. 574 (1960), Douglas opinion.

[21]With one minor exception, noted infra, of a right to inspect textbooks proposed for adoption.

[22]Cf. Sugarman, "Accountability through the Courts", 82 School Review 233 (1974).

[23]E.g. the following speeches by the Superintendent: "Education for Freedom in America," 11/25/73; "The Ebbing Tide of Individual Freedom," 7/5/74.

[24]Other statutes stating grounds for suspension/expulsion are, A.R.S. §15-446 (destruction of property); §15-302(D) (children of filthy or vicious habits or suffering from infectious diseases); §15-204 ("good cause" requirement -- it is not clear whether this compels strict construction of other categories, or whether it adds a general ground for exclusion). The exclusion provisions must be interpreted in light of the duties of school officials to admit children to the free public schools, Arizona Constitution, Art. 11, §6, A.R.S. §15-302(A).

[25]This was the rule in Arizona even before the U.S. Supreme Court's decision in Goss v. Lopez, 43 LW 4181 (1975), see Carpinteiro v. Tucson School District No. 1 of Pima County, 18 Ariz. App. 283, 501 P.2d 459 (1972).

[26]They are usually in the form of a petition for a writ of mandamus.

[27]One exception: A.R.S. 15-1501(B) requires that public and private school staff and students participating in certain activities we eye protection.

26A Of course this effect can be reversed by specific legislative provision excluding certain kinds of hearings from the JRA. For example, review of welfare department decisions is not covered by the JRA.

VI. PRIVATE EDUCATION

FOOTNOTES

One of the few official references to a state policy regarding private education was made in a 1962 case involving a property tax exemption:

> "[I]t has always been the policy of this state to encourage the establishment of private educational institutions." Verde Valley School v. County of Yavapai, 90 Ariz. 180, 367 P.2d 223, 225 (1952).

For a less harsh interpretation of a similar statutory provision see, State v. Counort, 124 P. 910 (S.Ct. Washington 1912).

FOOTNOTES

[1]At least five other Arizona public school districts were using, or had ordered MACOS. MACOS had been taught to fifth graders during the previous school year in the Sacred Heart School of the Diocese of Tucson, with results that pleased the teacher and the Diocesan Elementary Consultant. Letter to Dow Rhoton, by Sister Dorothy Ann, O.P., October 11, 1971. Madison Park was one of eight schools in the Madison Park District. The district superintendent was M.E. Hatter; the assistant superintendent for educational services was Dr. Dow Rhoton, who afterwards became the superintendent of Pinetop-Lakeside School District.

[2]Results of a questionnaire distributed by the principal were: 61 favorable; 7 unfavorable; 7 no reaction. Results of a telephone poll supervised by Mrs. C. Patty were: 81 parents want children to remain in MACOS; 11 want to put their children in optional study; 5 against MACOS but not wanting to opt out children; 69 undecided. The latter poll reached the households of 189 out of 221 children in the course.

[3]Dr. Rhoton noted that several parents transferred their children not because of opposition to MACOS, but to keep the children with friends whose parents had opted them out. Letter to Ed Martin, Nov. 11, 1971. In Lake City,Florida, parents were given this same option under similar circumstances. Forty-five out of a total of 360 children were withdrawn from MACOS. Lake City Reporter, December 4, 1970, p. 2.

[4] Interview, Jan. 1975; letter to Mrs. Peggy Chausse, Social Studies Consultant, Houston, Texas, 3/5/73

[5] Marin County, Calif., 1968-70; nation-wide poll conducted by Superintendent of Schools of Montgomery County, Maryland, 1971; survey published in Social Education, January 1975.

[6] 121 Cong. Rec. 2550-2607 (daily ed. April 9, 1975); Boston Evening Globe, April 13, 1975, at 15.

[7] Skinner sees a child's mind as a lump of clay, that should be molded. Bruner, on the other hand, compares the child's mind to a plant that needs both nourishment and freedom; his instructional theories stress diversity, not control. As late as March, 1975, a MACOS critic (Arizona Rep. John Conlan of Phoenix) referred to "Bruner and B.F. Skinner" as "behavioral psychologists" who authored the program. Arizona Republic, March 22, 1975, at B-18.

[8] Diocesan Elementary Consultant, Diocese of Tucson Schools, Sister Dorothy Ann, of Tucson.

FOOTNOTES:

[9]The technical legal term is "special subject."

[10]Given the constraints they were working under, this decision may have been in the best interests of the district's instructional program.

[11]See supra, at .

[12]The law at least makes it a little easier to get things started -- A.R.S. sec. 15-439 provides for special advisory meetings of school district electors to consider matters of this kind.

[13]They certainly would have had standing on an Establishment Clause claim, as Shofstall suggested, but would have lost on the merits.

[14]See supra, at 144 .

[15]See discussion of Scottsdale, supra, at 214 .

[16]Under the Distribution of Powers Article of the Arizona Constitution, see supra, at .

[17]Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056 (1927), Att'y Gen. Op. 61-16 (1961).

[18]A.C.R.R. R7-2-301, p. 75.

[19]Att'y Gen. Op. 69-17-6,

[20]Geography, Reading, Literature, and Science are prescribed subjects; Arts and Crafts and Drama are optional courses. A.C.R.R. R7-2-301, p. 75.

[21]Att'y Gen. Op. 61-138-L; see supra at 127, 134 et. seq.

[22]A.R.S. sec. 15-442(A)(2). Superintendent Shofstall tightened up the approval procedure in 1974, see supra, at 140. .

[23]A.R.S. sec. 15-1101

[24]Of course, the Board might react to such a holding by rapidly enacting several supplementary lists.

[25]The rules for the latter situation not being clearly spelled out in A.R.S. sec. 15-442(A)(2) and 15-1101.

[26]Kersey v. Main Consol., S.D. No. 10, 96 Ariz. 266, 394 P.2d 201 (1964).

[27]One of the developers of MACOS noted that the developers of the "new" curriculums in the 1960's sometimes adopted an arrogant tone in their insistence that they knew the best way to teach kids. Although befuddled parents did not feel qualified to criticize the math or science programs, the MACOS debate was carried on in a language they understood and involved images they could relate to. It is possible that MACOS bore the brunt of new-curriculum frustrations built up over a long period.

[28]Letter, P. Fordyce to J. Crenshaw, 12/8/70.

FOOTNOTES

1. "The teaching of Free Enterprise in high school can be one of the most significant changes of the century in the high school curriculum," "Teaching Free Enterprise in the High Schools," at 12, Feb. 1, 1974; hereinafter — Teaching.

1A. Interview, 7/17/74

1B. One senator says that many of his colleagues had second thoughts after voting for it, and would have tried to withdraw senate approval if the House had not moved so quickly to vote the bill into law. Senator Scott Alexander, Rep., Tucson, quoted in F. Malone, "Teaching Free Enterprise." Arizona, July 18, 1971, at 6, hereinafter Arizona. Another observor thinks that some votes were procured in a trade for conservative votes on a faltering liberal bill. Ed Cornell Interview, July 1974. There is no official legislative history in Arizona.

2. Mote (who is now a Phoenix attorney) became a target of ultra-conservatives for several years during his tenure as social studies chairman at Camelback after it became known that he was serving as executive director of the Arizona chapter of the American Civil Liberties (ACLU). At one point, a board member asked him to either resign as chairman or drop out of the ACLU. Mote battled, successfully, for renewal of his chairmanship for several consecutive years, but finally, for several reasons, he resigned.

3. This refers to the Department's testing-out policy. See supra, at .

4. They were much better on procedural due process claims.

5. Interview with Ed Cornell, September, 1974.

6. 393 U.S. 97 (1968).

7. 319 U.S. 624 (1943).

8. 406 U.S. 205 (1972).

9. On one reading, however, his first statement can be taken as advice about how the course should be "packaged" and "sold" to the public, but not necessarily what it would be like in fact.

10. Teaching, at 7.

11. The general theme is analogous to the "red versus expert" controversy in Communist China in the 1960's — the question there being whether important jobs should be filled by apolitical technicians, or by relatively unskilled political loyalists.

12. Op. Atty. Gen. ; Interview with Assistant Attorney General, Ralph Willey, July 18, 1974.

13. The two "heavy" concepts were:

"XI. Concept: Government's principal role is limited and governmental participation is enlarged only after it is proved necessary."
"XIX. Concept: The success of the Western market economics in raising the level of production is a function of the free enterprise system and its emphasis on economic freedom."

14. Phoenix Gazette, Nov. 7, 1972.

15. Camelback High School

16. Interview, Jean Watson, Social Studies Chairman of Camelback High School, July, 1974.

17. In Tucson, there is no placing out examination. It would be surprising, however, if schools in Tucson, which has been the hotbed of resistance to the conservative Board and Department, does not exercise considerable independence as to course content. In the Glenndale School District, free enterprise concepts are taught as part of another course. Jean Watson Interview

18. She singled out this grievance as being one of the few professionally legitimate ones she had heard. Interview, July, 1974.

ARIZONA APPENDIX
Selected Regulations
1) Common Schools

Subjects to be Taught	Years Taught	Optional Subjects
Arithmetic	1-8	Manual Training (statutory)
*Geography	1-8	Household Economics (statutory)
*World History	1-8	Arts and Crafts
*/**Ariz. History & Constitution	7-8	Band
*/**American History	7-8	Chorus
*/**Civics (U.S. Constitution)	7-8	Foreign Language
***Handwriting	1-8	Journalism
***Language	1-8	Physical Education
***Reading (including phonics)	K-8	Typing
***Spelling	1-8	Drama
Literature	6-8	
Health	1-8	
Science	1-8	
Music	1-8	

b. Kindergarten Subjects

The State Board of Education requires that each common school district having a kindergarten program include three subjects out of the prescribed list of subjects to be taught for common schools and that Reading including phonics be one of the three required. The Kindergarten Program shall be addressed to readiness for all subjects taught in the primary grades. (SBE Approved 11/26/73–A.G. Approved 1/22/74)

c. Arizona and United States Constitution

The State Board of Education, pursuant to A.R.S. § 15-1021, has adopted as a major goal that every student in Arizona shall have the equal opportunity to understand the essentials, sources and history of the U.S. and Arizona Constitutions and to understand the principles and ideals of our American Institutions.

The State Board, therefore, requires that each common school district determine that the pupils in their district are knowledgeable in this subject, as shown by a district developed method, prior to receiving a certificate of promotion from eighth grade. (SBE Approved 11/26/73–A.G. Approved 1/22/74)

d. Skill in the Basic Subject Areas

The State Board of Education has adopted the goal that every student shall have the equal opportunity to learn to read and write effectively and to master the basic computational skills.

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*These subjects may be combined into Social Studies.

**These subjects are required by A.R.S. § 15-1021 to be taught at least one year in the grammar school.

***These subjects may be combined into Language Arts. (SBE Approved 11/26/73–A.G. Approved 1/22/74)

The State Board believes that developing standards for these basic skills is prerequisite and essential to the learning process of the student. Therefore the State Board requires that promotion from year to year shall be based upon predetermined standards for these basic skills as established by the local district.

The State Board further requires that each student shall attain at least a sixth grade competency in reading, computational and written communicative skills, as determined by the local district, prior to receiving the standard eighth grade certificate of promotion. This policy becomes effective January 1, 1976.

The State Board further requires that each student shall demonstrate ability to read at a ninth grade level of proficiency as shall be established by the local district, prior to graduation from high school. This policy becomes effective for classes after January 1, 1976. (SBE Approved 11/26/73--A.G. Approved 1/22/74)

e. Sex Education Guidelines for the Common Schools.

Sex Education shall not be taught in the common schools of Arizona as a separate course. The common school, at the district level, may provide a specific elective lesson or lessons concerning Sex Education as a supplement to the state adopted Health Course of Study, subject to the approval of the State Board of Education. This supplement may only be taken by the student at the discretion and written request of the individual student's parent or guardian. The State Board will review such elective lesson/s proposed by a district and will approve or disapprove based on the following criteria:

i. Guidelines and Requirements for Qualification

(1) The District Board of Trustees has reviewed the total instructional materials which include audiovisuals, illustrative materials, equipment, supplementary books and pamphlets, as well as the more traditional textbook teacher manuals and resource materials; and has available alternate elective lesson/s from the state adopted optional subjects for those students who do not enroll in elective Sex Education.

(2) This supplementary elective lesson/s shall:

(a) Not supplant the state adopted Health Course of Study and shall not exceed six lessons, (a lesson being defined as what is normally taught in one day);

(b) Be taught in separate classes for boys and girls;

(c) Not include the teaching of specific sexual acts and practices, including those that enter into the abnormal, deviate or unusual.

(d) Not invade the privacy of the student by including tests, psychological inventories, surveys or examinations containing any questions about the student's or his parent's personal beliefs or practices in sex, family life, morality, values, or religion, and it shall not include any moral concepts or acts which are illegal or unconstitutional.

(e) Be ungraded; require no homework or tests; and any evaluation administered for the purpose of self-analysis shall not be retained or recorded by the school or the teacher in any form;

(3) The district, prior to final determination shall:

(a) Determine that the basic state adopted Health Course of Study is given first priority and the additional supplementary lesson or lessons will not supplant the course of study.

(b) Hold at least one widely publicized public hearing at least one week in advance for the purpose of receiving parental input as to the desirability of adding this elective lesson/s as a supplement to the basic health education course of study.

(c) Determine parental support prior to submission of proposed program to the State Board for approval.

ii. Evaluation Criteria for Approval of District's Elective Lesson/s

The District Board of Trustees has:

(1) Fulfilled the guidelines and requirements for qualifying;

(2) Submitted the total instructional material selected by the local district board, which is to supplement the state adopted Health Course of Study, to the State Board's State Textbook Advisory Committee for review and recommendation to the State Board.

The State Board of Education will make available for review to parents and/or guardians the total instructional materials to be used in such supplementary lesson/s within their district which have received the State Board's approval. This material shall be available from the office of the State Superintendent of Public Instruction.

The State Board of Education recommends that district boards develop a procedure for making available to parents, or guardians upon request, the total instructional materials (as listed above) to be used prior to enrollment. (SBE Approved 11/26/73–A.G. Approved 1/22/74)

f. Drug Education

The State Board of Education, pursuant to A.R.S. §§ 15-102.15 and 15-1023 has includ' ' Drug Education in the state adopted Health Course of Study for common schools. (SBE Approved 11/26/63–A.G. Approved 1/22/74)

g. Parental Involvement

The State Board of Education believes and suggests that parents should be involved in educational pursuits and encouraged to participate actively with the teachers in helping children learn. The views of parents should be solicited and given serious consideration in the selection of instructional materials and methods. (SBE Approved 11/26/73–A.G. Approved 1/22/74)

Legal Basis

A.R.S. § 15-102.12 states: "The state board of education shall ascertain that the school laws are properly enforced."

A.R.S. § 15-102.14 states: "The state board of education shall exercise general supervision over and regulate the conduct of the public school system."

A.R.S. § 15-102.15 states: "The state board of education shall prescribe and enforce a course of study in the common schools."

A.R.S. § 15-102.16 states: "The state board of education shall prescribe the subjects to be taught in all common schools."

A.R.S. § 15-102.17 states: "The state board of education shall prescribe a list of optional subjects to be taught in all common schools. The list shall include manual training, household economics, kindergarten and such other subjects as the board determines."

A.R.S. § 15-102.25 states: "The state board of education shall by June 30, 1975, in cooperation with all local school districts, develop, establish, and direct the implementation of a continuous uniform evaluation system of pupil achievements in relation to measurable performance objectives in basic subjects. The board shall assist in the development of alternate learning procedures to help pupils attain their individual learning expectancy levels based on intelligence factors, achievement factors and teacher evaluation. Basic subjects shall be defined for these purposes as reading, writing, and computation skills."

A.R.S. § 15-488 C states: "Each common school district shall establish a kindergarten program, unless the governing body of such common school district files an exemption claim with the state department of education. A district is exempt from establishing a kindergarten program if it files, with the state department of education, an exemption claim which states that the establishment of kindergarten will interfere with the work of, or maintenance of efficiency in, the grades and that the kindergarten is not in the best interests of the district."

A.R.S. § 15-1021 states: "All public schools shall give instruction in the essentials, sources, and history of the constitutions of the United States and Arizona and instruction in American institutions and ideals and in the history of Arizona. The instruction shall be given in accordance with the state course of study for at least one year of the grammar and high school grades respectively. The state board of education shall prescribe suitable teaching materials for such instruction."

A.R.S. § 15-1023 states:

"A. Instruction on the nature and harmful effects of alcohol, tobacco, narcotic drugs and dangerous drugs, including the plant cannabis and all substances and parts of the plant, on the human system, and instruction on the prevention of alcohol, tobacco, narcotic and dangerous drug abuse, including the plant cannabis and all substances and parts of the plant, shall be included in the courses of study in common and high schools. The instruction may be combined with health, science, citizenship or similar studies.

B. The state board of education may, at the request of a school district, provide the following for use in carrying out the provisions of this section:

1. A suggested course of study.

2. A system of in-service training for teachers.
3. A list of available films and other teaching aids.

C. For the purpose of this section, the definitions of "cannabis" and "narcotic drugs" as defined in § 36-1001 and "dangerous drug" as defined in § 32-1901, paragraph 9, are applicable."

D. Textbooks

1. Powers and Duties of the State Board of Education

The State Board of Education:

"Shall prescribe textbooks for the common schools, and shall prepare a list of not less than three nor more than five textbooks for each grade and each subject taught in the common schools for the selection by the school district of one book from such list for each student, except that for courses which do not require that each student have a book other than classroom instruction the district need only purchase one book for each student in the largest group which would be receiving classroom instruction at any one time. The books or instructional matter so selected shall be purchased by the school district direct from the publisher as provided in this title. Textbooks selected pursuant to the provisions of this title shall not be changed during the next five years." (A.R.S. § 15-102.18)

"Shall annually prepare lists of approved supplementary books from which the board of trustees of a school district may, with the approval of the state superintendent of public instruction, purchase supplementary books." (A.R.S. § 15-1101 B)

"Shall enter into contracts with publishers for the purchase by the school districts of the textbooks desired from the lists selected by the state board. Publishers shall give a cash or corporate surety bond payable to the state and approved by the board indemnifying the school districts in the textbook purchases in an amount not less than five hundred nor more than ten thousand dollars as may be determined by the board, conditioned that:

The publisher will faithfully comply with the conditions of the contract and will furnish to the state the books provided for in the contract at prices not exceeding the lowest prices then granted to any buyer.

If there is a decrease in the prices given to a person purchasing such books from the publisher, the state shall have the benefit of the decrease in price.

The publisher shall file with the board a statement sworn to before some officer in the state, stating the lowest prices for which his series of textbooks is sold anywhere in the United States. If the publisher of a school textbook adopted by the state issues a special edition of any book so adopted, or essentially the same book, the state may substitute that special edition at the net price at which it is sold elsewhere.

Every contractor who enters into any contract with the state board for furnishing textbooks shall, upon request of a member of the board, mail to the board a sworn price list of the textbooks which the contractor furnishes or desires to furnish to the state." (A.R.S. § 15-1103 A, B, and C)

May request the Attorney General to institute action for damages on the bond of a contractor who violates a condition of a textbook contract entered into by him with the State Board. (A.R.S. § 15-1105 paraphrased)

2. Powers and Duties of the District Governing Boards

The Board of Trustees shall:

"Enforce the courses of study and select all textbooks used in the schools from the multiple lists determined and authorized by the state board of education pursuant to paragraph 18 of § 15-102 and purchase the same from the publishers under contracts negotiated by the state board as provided in this title. One-fourth of the amount budgeted for textbooks may be expended for teaching aids relating to the textbooks selected. District school funds may be budgeted and expended by the board for supplementary books, as contained in the lists prepared by the state board of education pursuant to subsection B of § 15-1101, and for such additional textbooks as may be necessary because of an extraordinary increase in enrollment or an act of God, provided that supplementary books shall not be purchased in such quantities as to take the place of the textbooks prescribed by paragraph 18 of § 15-102." (A.R.S. § 15-442.2)

"Exclude from schools all books, publications or papers of a sectarian, partisan, or denominational character." (A.R.S. § 15-442.5)

"Exclude from school libraries all books, publications and papers of a sectarian, partisan or denominational character." (A.R.S. § 15-450 B.2)

Sell to a pupil or parent such books as necessary at the price the Board of Education pays for the books. (A.R.S. § 15-1108 paraphrased)

Initiate proceedings for revocation of certificate of any teacher who uses sectarian or denominational books or teaches any sectarian doctrine or conducts any religious exercises in school for this unprofessional conduct and his certificate shall be revoked. (A.R.S. § 15-203 paraphrased)

"All textbooks now in the possession of the common school districts and those purchased by districts as provided by this title shall be and remain the property of the school districts. The school districts shall hold pupils using the textbooks responsible for damage or loss of the textbooks. When a pupil for any reason requires a second copy of a textbook, the pupil shall pay for the book at his own expense." (A.R.S. § 15-1107)

3. Duties of Teachers

"Enforce the course of study, use of adopted textbooks and the rules and regulations prescribed for schools." (A.R.S. § 15-201.3)

4. Duties of Pupils

Pupils using the textbooks shall be responsible for damage or loss of the textbooks, and if for any reason requires a second copy of a textbook shall pay for the book at his own expense. (A.R.S. § 15-1107 paraphrased)

5. Policies of the State Board of Education re Textbooks

a. Assurance of Textbook Compliance

The State Board of Education, pursuant to A.R.S. §§ 15-102.12 and 15-102.18, issues each year an assurance of textbook compliance form to each school district to be returned no later than September 30 each year. Non-compliance with A.R.S. § 15-442 will result in suspension of funds until compliance is accomplished.

2) High Schools

"The board shall prescribe the course of study for the high school subject to approval by the state board of education." (A.R.S. § 15-545 B)

"All public schools shall give instruction in the essentials, sources, and history of the constitutions of the United States and Arizona and instruction in American institutions and ideals and in the history of Arizona. The instruction shall be given in accordance with the state course of study for at least one year of the grammar and high school grades respectively. The state board of education shall prescribe suitable teaching materials for such instruction." (A.R.S. § 15-1021)

"The state board of education shall adopt a course of study in the common schools and high schools." (A.R.S. § 15-1022)

B. Subject areas

1. Powers and Duties of the State Board of Education

The State Board of Education shall:

Adopt a course of study and suitable teaching materials for instruction, for at least one year in the grammar and high school grades respectively, in the essentials, sources, and history of the constitutions of the United States and Arizona and instruction in American institutions and ideals and in the history of Arizona. (A.R.S. § 15-1021 paraphrased)

Include instruction on the nature and harmful effects of alcohol, tobacco, narcotic drugs and dangerous drugs, including the plant cannabis and all substances and parts of the plant, on the human system, and instruction on the prevention of alcohol, tobacco, narcotic and dangerous drug abuse, including the plant cannabis and all substances and parts of the plant, in the courses of study in common and high schools. The instruction may be combined with health, science, citizenship or similar studies. (A.R.S. § 15-1023 A paraphrased)

"The state board of education may, at the request of a school district, provide the following for use in carrying out the provisions of this section:

1. A suggested course of study.
2. A system of in-service training for teachers.
3. A list of available films and other teaching aids." (A.R.S. § 15-1023 B)

"For the purpose of this section, the definitions of "cannabis" and "narcotic drugs" as defined in §36-1001 and "dangerous drug" as defined in § 32-1901, paragraph 9, are applicable." (A.R.S. § 15-1023 C)

Prescribe a course of study and suitable teaching materials for instruction, for at least one semester equal to one-half unit of credit, on the essentials and benefits of the free enterprise system. As used in this section "free enterprise" means an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision rather than by state control, and by prices determined in a free manner. (A.R.S. § 15-1025 paraphrased)

2. Powers and Duties of the District Governing Boards

The Board of Education of a high school:

"Shall, for the management of the high school, have all the powers and duties vested in common school trustees." (A.R.S. § 15-545 A)

Provide instruction in the essentials, sources, and history of the constitutions of the United States and Arizona and instruction in American institutions and ideals and in the history of Arizona. The instruction shall be given in accordance with the state course of study for at least one year of the grammar and high school grades respectively. The State Board of Education shall prescribe suitable teaching materials for such instruction. (A.R.S. § 15-1021 paraphrased)

Provide instruction on the nature and harmful effects of alcohol, tobacco, narcotic drugs and dangerous drugs, including the plant cannabis and all substances and parts of the plant, on the human system, and instruction on the prevention of alcohol, tobacco, narcotic and dangerous drug abuse, including the plant cannabis and all substances and parts of the plant, in the courses of study in common and high schools. The instruction may be combined with health, science, citizenship or similar studies. (A.R.S. § 15-1023 A paraphrased)

"The state board of education may, at the request of a school district, provide the following for use in carrying out the provisions of this section:

1. A suggested course of study.
2. A system of in-service training for teachers.
3. A list of available films and other teaching aids." (A.R.S. § 15-1023 B)

"For the purpose of this section, the definitions of "cannabis" and "narcotic drugs" as defined in § 36-1001 and "dangerous drug" as defined in § 32-1901, paragraph 9, are applicable." (A.R.S. § 15-1023 C)

3. Policies of the State Board of Education re Subject Areas

a. Skill in the Basic Subject Areas

The State Board of Education has adopted the goal that every student shall have the equal opportunity to learn to read and write effectively and to master the basic computational skills.

The State Board believes that developing standards for these basic skills is prerequisite and essential to the learning process of the student. Therefore the State Board requires that promotion from year to year shall be based upon predetermined standards for these basic skills as established by the local district.

The State Board further requires that each student shall attain at least a sixth grade competency in reading, computational and written communicative skills, as determined by the local district, prior to receiving the standard eighth grade certificate of promotion. This policy becomes effective January 1, 1976.

The State Board further requires that each student shall demonstrate ability to read at a ninth grade level of proficiency as shall be established by the local district, prior to graduation from high school. This policy becomes effective for classes after January 1, 1976. (SBE Approved 11/26/73–A.G. 1/22/74)

b. Sex Education Guidelines for High Schools

A course in sex education may be provided, at the district level in the high schools of Arizona, subject to the approval of the State Board of Education, pursuant to A.R.S. § 15-545 B. The course of study for such sex education course will receive the State Board's approval if the district certifies that these guidelines have been followed:

i. Guidelines and Requirements for Qualification

(1) The District Board of Education has reviewed the total instructional

materials which include audiovisuals, illustrative materials, equipment, supplementary books and pamphlets, as well as the more traditional textbook, teacher manuals and resource material.

(2) The sex education course shall:

(a) Not include the teaching of specific sexual acts and practices, including those that enter into the abnormal, deviate or unusual.

(b) Not invade the privacy of the student by including tests, psychological inventories, surveys or examinations containing any questions about the student's or his parents' personal beliefs or practices in sex, family life, morality, values, or religion;

(c) Not substitute for a course in Health Education.

ii. Evaluation Criteria for Approval of District's Course of Study

The District Board of Education has:

(1) Fulfilled the guidelines and requirements for qualifying;

(2) Submitted the course of study for sex education to the State Board's State Textbook Advisory Committee for review and recommendation to the State Board.

The State Board of Education recommends that district boards develop a procedure for making available to parents, or guardians, upon request, the total instructional material (as listed above) to be used in this course; for notification to parents whether classes will be separate for boys and girls; for obtaining consent of parents or guardians prior to enrollment of minor pupils in this course. (SBE Approved 11/26/74–A.G. Approved 1/22/74)

c. Parental Involvement

The State Board of Education believes and suggests that parents should be involved in educational pursuits and encouraged to participate actively with the teachers in helping children learn. The views of parents should be solicited and given serious consideration in the selection of instructional materials and methods. (SBE Approved 11/26/73–A.G. Approved 1/22/74)

Legal Basis

"The state board of education shall ascertain that the school laws are properly enforced." (A.R.S. § 15-102.12)

"The state board of education shall exercise general supervision over and regulate the conduct of the public school system." (A.R.S. § 15-102.14)

"The board (of a high school) shall prescribe the course of study for the high school subject to approval by the state board of education." (A.R.S. § 15-545 B)

"All public schools shall give instruction in the essentials, sources, and history of the constitutions of the United States and Arizona and instruction in American institutions and ideals and in the history of Arizona. The instruction shall be given in accordance with the state course of study for at least one year of the grammar and high school grades respectively. The state board of education shall prescribe suitable teaching materials for such instruction." (A.R.S. § 15-1021)

"The state board of education shall adopt a course of study in the common schools and high schools." (A.R.S. § 15-1022)

C. Textbooks

1. Powers and Duties of the State Board of Education

The State Board of Education shall:

Adopt a course of study and suitable teaching materials for instruction, for at least one year in the grammar and high school grades respectively, in the essentials, sources, and history of the constitutions of the United States and Arizona and instruction in American institutions and ideals and in the history of Arizona. (A.R.S. § 15-1021 paraphrased)

Prescribe a course of study and suitable teaching materials for instruction, for at least one semester equal to one-half unit of credit, on the essentials and benefits of the free enterprise system. (A.R.S. § 15-1025 A paraphrased)

2. Powers and Duties of the District Governing Boards

The Board of Education of a high school:

"Shall, for the management of the high school, have all the powers and duties vested in common school trustees." (A.R.S. § 15-545 A)

"Shall prescribe the course of study for the high school, subject to approval by the state board of education." (A.R.S. § 15-545 B)

"Shall prescribe up to five textbooks for each course of study and the teacher, with the consent of the board of education, may use any one of the prescribed textbooks for the purposes of his course." (A.R.S. § 15-545 D)

3. Duties of Teachers

The Teacher:

May use, with the consent of the Board of Education, any one of the prescribed textbooks for the purposes of his course. (A.R.S. § 15-545 D paraphrased)

4. Policies of the State Board of Education re Textbooks

a. Textbook Content

Textbook Content shall not interfere with the school's legal responsibility to teach citizenship and promote patriotism. Textbooks prescribed by the State Board of Education shall be objective in content; reflect a minimum of bias in interpretations; and shall not reflect adversely upon persons because of their race, color, creed, national origin, ancestry, sex or occupation. Violence shall be treated in the context of cause and consequence: it shall not appear for reasons of unwholesome excitement or sensationalism. Coarse, vulgar, profane expressions or terms shall be avoided in all textbook content. It should be noted that this applies to textbooks mandated to be chosen by the State Board, and does not apply to library books or any other books chosen by the school districts under their statutory power. (SBE Approved 11/26/73–A.G. Approved 1/22/74)

b. Establishment of the State Textbook Committee and its Procedural Guidelines

i. Establishment

In order to facilitate the performance of the varied duties relating to textbooks, adoption procedures, and special evaluations, the State Board of Education shall appoint a nine(9) member Advisory Committee, all of whom shall be voting

CHAPTER TWO

STATE OF CALIFORNIA CURRICULUM LAW

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November, 1975

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I. California State Constitution

A. State Responsibility and Role Allocation

Like other state constitutions studied the California Constitution establishes a general framework within which the legislature and other educational agencies must work -- a framework which specifies what must be done, what may be done, and what may not be done. As was the case in the other states the State Constitution imposes an affirmative duty on the legislature to do something about education in the state.

Article IX, Section 1 provides:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

In a subsequent section the responsibility of the legislature is made more specific: (Article IX, Section 5):

> The legislature shall provide for a system of common schools by which a free shcool shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

Beyond these general obligations the State Constitution establishes that there should be certain institutions involved in the operation or control of this system of common schools. At the state level the Constitution provides for an elected state superintendent of schools (Article IX, Section 2) and a state board of education to be appointed or elected as determined by the legislature. (Article IX, Section 7). Pursuant to this power the legislature has established a ten member board, appointed by the Governor with the approval of two-thirds of the State Senate. (Cal. Educ. Code, Section 101) The superintendent by statute has been made

the secretary and executive officer of the board as well as Director of the Department of Education. (Cal. Educ. Code, Sections 105, 353)

An important constitutional duty of the state board is the adoption of textbooks for use in grade one through eight in the state; the texts are to be furnished without cost as provided by statute. (Article IX, Section 7.5) This provision was the basis for striking down a legislative attempt to influence the selection of textbooks. In State Board of Education v. Levit, 52 C.2d 441, 343 P.2d 8 (1959) the legislature had adopted a statute barring the expenditure of textbook funds for two specifically named books, Science for Work and Play, and Science For Here and Now. The state board challenged the statute pursuant to Article IX, Section 7.5 and won the case. The court said the legislature may regulate the process of selection but it may not make the ultimate selection and that this limitation held even when the state board was selecting books to be used in courses that were not required by statute. In dictum the court added that the legislature could, however, determine in which courses textbooks shall or shall not be used, and could bar all science texts for science classes or bar science classes in grades one and two. But if texts were to be used, the court said, they must be selected by the state board. (Also compare Attorney General's Opinion, no. 60-94, 1960. Whether the legislature could bar science in grades one and two and not run afoul of the U.S. Constitution is a question raised by Meyer v. Nebraska, 262 U.S. 390 (1923). In that case a state statute which barred, before the eighth grade, the teaching of any subject to any person in any language other than English was challenged. The U.S. Supreme Court struck the statute down as it applied to a private teacher in a private school on the grounds that it violated the 14th Amendment Due Process Clause in prohibiting the teacher from pursuing his profession. The Court specifically

said it did not reach the question of the reasonable regulation of the curriculum of the public schools. Also in Epperson v. Arkansas, 393 U.S. 97 (1968) in which the Supreme Court struck down a state prohibition against the teaching of Darwinism in the schools because the statute, said the Court, had been motivated by religion, the door was left open to the possibility that the subject of biology as a whole could be barred from the public schools.)

Beyond allocating authority among state officials, the State Constitution also establishes certain relationships between, on the one hand, the state, and, on the other, local districts. Section 3 of Article IX requires the election of a superintendent of schools for each county, provided, the legislature may authorize two or more counties to unite and elect one superintendent for the counties so uniting. Similarly the legislature pursuant to Section 7 of Article IX must provide for the appointment or election of a board of education in each county.

Below the county level Article IX, Section 14 provides:

> The legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts and community college districts, of every kind and class, and may classify such districts.
>
> The legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.

This provision should be read in conjunction with Article IX, Section 5 which requires the legislature to provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year. And Section 6 of the same article provides in part:

> The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law and, in addition, the school districts and other agencies authorized to maintain them. No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.

Several points about these provisions are worth noting. Section 14 specifically authorizes the legislature to delegate authority to local school districts not only to carry on programs and activities, but also to initiate them. That delegated power must be consistent with the purposes for which the districts were established and presumably an understanding of those purposes must begin with Article IX, Section 1 quoted above. In any event, we have in the State Constitution a starting point for understanding the problems of delegation of authority (taken up below.)

Next, Section 6,quoted immediately above,itself has interesting implications for any legislative attempts to adopt some of the recently suggested organizational reforms for education. The provision would seem to put a severe limitation upon increased parental involvement in the operation of the schools: Any organizational arrangement which directly or indirectly placed any part of the public system under any authority other than the Public School System would be unconstitutional. Not only might this preclude greater parental control over the public school system, it might inhibit such innovations as those forms of performance contracting under which a whole school is turned over to a private contractor to operate pursuant to certain guarantees. Conceivably this provision may place some limits on the extent teachers, through collective negotiations, may obtain increased control over the public school system.

An interesting problem involving these provisions was brought to

the State's Attorney General for his opinion. (Attorney General's Opinions, No. 70-30, (1970).) To qualify for federal funds pursuant to Title III of the Elementary and Secondary Education Act (Public Law 89-10, as amended by Public Law 90-247) -- a federal grant-in-aid program designed to encourage educational innovation -- the state legislature created the Educational Innovation Advisory Commission which had the functions (Cal. Educ. Code, Section 576): of developing a state plan for use of Title III funds; recommending to the state board for approval of Title III projects; adopting rules and regulations for its own government; and reporting its activities to the state board, governor and legislature. Subsequently Section 32014 of the Educational Code was adopted by the legislature and it gave the Commission the following powers and responsibilities:

> (a) Employ a staff for the commission and for the innovative schools.
> (b) Establish and operate the innovative schools.
> (c) Acquire property and equipment to which it shall hold title.
> (d) Receive and expend funds to support the commission and the innovative schools.
> (e) Determine the location of the innovative schools.
> (f) Determine the program of instruction and the programs of research and experimentation to be undertaken by the innovative schools.
> (g) Contract with other governmental agencies and private persons or organizations to provide or receive services, supplies, facilities and equipment.
> (h) Adopt rules and regulations for its own government and for the government of the innovative schools.

The first question asked of the Attorney General was whether this section was consistent with Article IX, Section 6 quoted above. Under one view of that section only those facilities which were under the cognizance of the state superintendent or state board were within the Public School System. The Attorney General did not accept that interpretation pointing out that the state colleges were not under either the state superintendent or board.

Further, Article IX, Section 5 (quoted above) laid a basis for the legislature to establish schools that were independent of the state superintendent and board.

As for Sections 2 and 7 of Article IX dealing with the powers of the state superintendent and board specifically, the Attorney General pointed out that both these sections left the determination of the duties of the superintendent and board up to the legislature. Hence, the legislature did not have to place these innovative schools within their control. By implication, however, the Attorney General suggested that with respect to textbooks the power of the state board remained in tact -- as to that part of the program of these innovative schools the state board remained in control.

Finally we might take note of one additional portion of the opinion dealing with Article IX, Section 8:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this state. (Emphasis added.)

With regard to this provision the Attorney General simply noted that the Commission was part of the Public School System and officials connected with these schools and members of the Commission are "officers of the public schools" within the meaning of the provision.

As for Section 8 we might note that it appears to place a major stumbling block in the way of any kind of state supported voucher system even if the vouchers could only be used at non-sectarian schools. The requirement that public money be spent only on schools under the exclusive control of officers of the public schools could only be gotten around if:

(i) the voucher, once handed over to the child's parents, was no longer deemed to represent "public" money; or (ii) for purposes of this amendment the officials running the private schools to which the vouchers are brought, would be deemed officers of public schools. The later way of interpreting this provision is not warranted for if this were the way the provision were to be interpreted, it would lose almost all meaning. The first alternative is also not very promising. This interpretation seems to limit too severely the notion of "public" money. Under the suggested reading even money handed over to sectarian schools would become private money once the voucher reached the hands of the students, and whether the courts would accept such a transmutation of the money seems at best doubtful.

The California legislature in 1973 had to wrestle with the problems arising out of Section 8 of Article IX, when it adopted the Demonstration Scholarship Act of 1973, (Cal. Educ. Code Sections 31175 et seq.) This act authorizes the establishment of not more than four experimental projects involving vouchers. Under the Act there would be established as part of a project a "demonstration board" which might either be an existing local school board or a new board appointed by a participating local district. The demonstration board would be authorized to receive money from the federal government -- it was assumed basic funding for the experiment would be coming from the federal government -- pursuant to a contract between the demonstration board and the federal government. This contract would specify the amount of the "scholarship" or voucher that would be made available to participating students; among the requirements of the act is that there be a compensatory scholarship for disadvantaged children with the amount of the scholarship to be settled in the contract.

Public and private schools could participate but the private schools

may not be "controlled by any religious creed, church, or sectarian denomination whatever, nor have as their objective the furtherance of any religious sect, church, creed, or sectarian purpose, either directly or indirectly." (Cal. Educ. Code, Section 31196.) Further, the private school must be "under the exclusive control of officers of the public schools within the meaning of Section 8 of Article IX..." Exclusive control is defined to mean (Cal. Educ. Code, Section 31196(c):

> 1. The power to promulgate general rules and regulations regarding the use of demonstration scholarships.
> 2. The power to establish the amount of the scholarship.
> 3. The power to prescribe rules and regulations which are binding upon participating schools.
> 4. The power to establish standards for teachers, instructors, and textbooks.
> 5. The power to review and approve the suspension or expulsion of a pupil of a participating board.
> 6. The power to make any appropriate use of participating school facilities, equipment and supplies.

In short, basic policy control is turned over to the demonstration board but significant areas of discretion are left to the control of this "private" school. Actual selection of which pupils will be admitted remains in the hands of the private school, subject to certain statutory restrictions applicable to all participating schools as outlined below. Basic control over which specific teachers will be hired remains in the hands of the private school as does general control of the overall philosophy and thrust of the education program.

These provisions "substantially involve" government in the private school to the point that we might conclude that the private school had become in effect a public school for purposes of the "state action" doctrine under the U.S. Constitution. As a result, students in these former wholly private schools would enjoy the protection of the state and federal constitutions.

(Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Reitman v. Mulkey, 389 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).) This possibility that these schools must be deemed to be "public" schools for purposes of the Constitution, plus the fact of the many regulations to which they are subjected (to be described momentarily) has a bearing upon the problem of the doctrine prohibiting the delegation of authority to "private" groups. We take this issue up below.

The public and private schools which become part of a demonstration project are subject to Section 31185(e) which provides in part that comprehensive information in written form be available on the course of study offered, curriculum, materials, and textbooks, the qualifications of the teachers, administrators, and paraprofessionals employed, the minimum school day, the salary schedules, the actual amount of money spent per pupil and such other information as may be required by the demonstration board.

The selection of teachers and the admission of pupils must be on a non-discriminatory basis. Section 31185(b) privides, in part, the voucher may only be used at a school which:

> ...provides that students from disadvantaged racial or bilingual minority groups be admitted in proporation as such students make application; and takes an affirmative position to secure racially, ethnically, and socioeconomically integrated student body which shall, to the greatest possible extent, reflect the racial, ethnic, and socioeconomic composition of the demonstration area. Any school that receives applications in excess of enrollment capacity shall fill at least 50 percent of its enrollment capacity by a lottery among the applicants, to further assure nondiscriminatory admissions procedures, except when the contract provides that students currently enrolled and their younger siblings are not subject to the lottery...

Participating projects must also have an advisory board made up of parents, teachers, administrators and other appropriate people.

The drafting of this act reflects the care that must be taken in

establishing experimental programs so that they will comply with both the state and federal constitutions, as well as The Civil Rights Act of 1964, Title VI. (42 U.S.C. § 200d)

As noted above, arrangements of the sort just outlined raise questions with regard to the delegation of authority, and it is to this question we now turn.

Article 4, Section 1 is our starting point.

> The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.

As was true of the other states this general grant of authority to the legislature implies a limitation of the legislature's authority: it may not delegate away its powers. The discussion of this limitation will take place in four parts: (i) the doctrine as applied to legislative delegation of authority to state officials; (ii) the doctrine as applied to the delegation of authority to local school districts; (iii) the doctrine as applied to the delegation of authority to private groups; (iv) the doctrine as applied to the sub-delegation of authority.

(i) California doctrine on the delegation of authority to state agencies is basically similar to that found in New York in the sense the doctrine has developed in such a way that it does not usually serve as a basis for constraining the legislature. The California courts have said that if the legislature has laid down "basic policy" then a delegation of authority to implement that basic policy should be upheld. (Younger v. City of El Dorado, 5C.3d 480, 96 Cal Rptr 553, 487 P.2d 1193 (1971)

Thus even a delegation of authority to do what was is "necessary, convenient or expedient" was upheld. (Metro Water District of Southern Cal. v. Whitsett, 215 C. 400, 10 P.2d 751 (1932)

However on occasion the prohibition against delegation of authority can have a bite. In one case a writ of mandamus was sought challenging the delay by the California State Air Resources Board of the implementation of the oxides of nitrogen control program. The agency said it delayed the implementation of the policy because of the energy crisis, but the California Supreme Court responded that if the delay were permitted because of the energy crisis, the agency would be establishing a policy placing energy consumption as a higher priority to air cleanliness. Deciding such priorities involved a matter of fundamental policy which only the legislature could make and could not be delegated. The legislature, said the Court, was the most representative form of government and it should make such decisions. (Clean Air Constituency v. California State Air Resources Board, 11 Cal. 3d 801, 523 P.2d 617, 114 Cal. Rept. 577 (1974) (in bank).)

No cases were found dealing with the propriety of delegations of authority with regard to education. This is understandable. The state legislature in California, as will become clearer below, has taken some pains to spell out the educational policy of the state, thus there has been little occasion to attack delegations of authority on the ground that "basic policy" had not been established.

(ii) Article 9, Section 14, specifically authorizes the legislature to "authorize the governing boards of all school districts to initiate and carry on any program, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." Again no cases were found which interpreted this provision. Presumably this provision must be read in conjunction with Article 4, Section 1 so as to avoid a potential conflict. Thus, we might

find in Section 14 a limitation on the delegation of authority to local districts which is similar to the limitation established by the courts with regard to delegations of authority to state agencies. In other words, Section 14 can be read to say that delegations are permitted so long as they do not constitute delegations of authority to determine basic educational policy. Here again we might note that the legislature has not in practice approached the outer-bounds of its authority as it has, more than other states, taken pains to specify in the statutory code the basic educational program that must be provided in the public schools.

(iii) As was found in the other states the basic concern of the courts with regard to the delegation of authority to private organizations and individuals is over the possibility of the abuse of such authority. Thus, in one case the court struck down an arrangement whereby the timber industry was to regulate its own cutting practices. The court said that the delegation of such authority to the industry without standards invited abuse in light of strong pecuniary interest of the companies to engage in practices that might be inimical to the public interest. The public which was affected by these practices would have no way of influencing the policy that was thereby denied due process. (Bayside Timber Co. v. Board of Sup'rs of San Mateo Cty., 97 Cal. Rptr. 431, 20 CA 3d (1971) In another case the delegation of authority was upheld because the public interest had been protected by the arrangements. In this case an ordinance allowed the police chief to designate taxi stands if the written consent of the person who occupied the ground floor of the building adjacent to the proposed stand consented. The court found no improper delegation because obtaining permission from the occupant of the building was only one condition precedent for the establishment of the taxi stand. Basic control over site selection and final approval remained in the hands of

the police chief. As for the problem of an improper delegation of authority to the police chief, consistent with the delegation doctrine as outlined above, the court said there was no improper delegation as the basic purpose of the ordinance implied the standards the chief had to follow. Basic policy, in other words, the court said, had been formulated by city council. (In Re Petersen, 51 C.2d 177, 331 P.2d 24, appeal dismissed 360 U.S. 314 (1958).

This brings us back to a consideration of the legislation permitting the establishment of up to four voucher projects in the state. It will be recalled that the legislation permitted private school involvement. Those private schools under the arrangement sketched in the statute retain significant control over many aspects of the running of a school, thus they have been given significant control over the expenditure of the public funds they will get by redeeming the vouchers given to them by the students enrolled in the school. Does this amount to an impermissible delegation of authority to a private organization? The answer would seem to be "no."

First, the act is so constructed that important responsibility over the private school is given over to the "demonstration board." Thus a mechanism is established whereby the private school is accountable to a public body. Aspects of basic education policy are in public hands. Second, there are a significant number of statutory guidelines built into the demonstration act that will constrain in many respects the private school. Power to control public funds has not been delegated without any state guidance on the matter. Third, as noted above, the government seems so substantially involved in the operation of these private schools that for purposes of the U.S. Constitution these schools may be deemed to be "public" schools, thus the students would be afforded the protection of the U.S.

Constitution. This protection also helps to constrain the uses to which the public money will be put. In short, there are sufficient safeguards in the law to preclude or at least to reduce the chances of the abuse of the authority given to the private schools, thus we may not want to label the delegation here as a delegation to a private group with the result it must be struck down.

(iv) The question of the sub-delegation of authority raises several related issues: (a) whether the officer or agency sub-delegating the authority has been given the statutory authority to delegate his/its discretionary authority; (b) whether this authority to sub-delegate is constitutional on its face; (c) whether the execution of the authority to sub-delegate was carried out in accordance with the statute; (d) and, if so, whether the execution of the authority has been carried out in accordance with such constitutional requirements as the due process clause. Only the case involving the designation of taxi stands, discussed above, was found dealing with this issue. The court in that case seemed only concerned with issue (d). Thus we have little enlightenment from the courts on the problem of sub-delegation in California. But unlike the other states studied the California legislature did anticipate the need for sub-delegation of authority (Cal. Educ. Code, Section 7):

> Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

Here again no cases were found construing this provision as it bears upon control of the public school educational program. (But see 19 Opinions of the Attorney General 180)

In sum, compared to the other states studied we have little California case law spelling out the parameters of the delegation doctrine as it bears upon control of the school curriculum. In any event, the California species of the doctrine does not seem to be a major obstacle to legislative manipulation of the allocation of authority to control the school curriculum. But unlike other states the legislature in California has been less prone to delegate sweeping powers to educational agencies but instead has usually couched such delegations in directives more specific than found in the other states studied. The question of the delegation of authority in California as a practical matter is even a less important problem than it might be in other states.

B. Indidivual Rights

Regardless of who must be given certain authority or who may be given authority under the State Constitution there are certain restraints imposed upon the exercise of that authority by the rights given to individuals by the Constitution. Most significant for these purposes is the emerging notion of a right to an education.

There are two main dimensions of any possible definition of a right to an education captured by asking two questions: (i) Against whom does the right run?; and, (ii) what does it ask of the person (institution) which owes the duty to the one who enjoys the right? There are three possible answers to the first question -- the government or the parent(s) of the child, or perhaps both. Very roughly there are at least four possible answers to the third question. First the child is owed certain inputs -- money, facilities, services to be provided at some minimum level regardless of the likely affects on achievement; or the duty is that the child is owed

a provision of those inputs which according to present knowledge is reasonably calculated to result in a certain level of achievement; or the duty is to assure each child that his family and social background will not be a major determinant of the level of his achievement.

The constitutional provisions which provide the basis for this emerging notion of a right to an education in California are Article IX, Section 1 and Section 5 quoted above as well as the following provisions:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

And Section 7 of the same article provides (Article 1, Section 7):

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.
>
> (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges and immunities granted by the Legislature may be altered or revoked.

Taken together these provisions have been the basis for important challenges to the handiwork of the state legislature and local school districts.

In two early cases the above quoted provisions led to the conclusion by the California Supreme Court that the State Constitution assured all students of a right to a free public education. Thus when a public school district refused to admit an Indian student the Court ordered the student to be admitted despite the fact the student had the opportunity to attend a federal Indian school or a private school (Piper v. Big Pine School District of Inyo County, 193 C. 664, 226 P. 926 (1924) also see Ward v. Flood, 48 C. 36, 17 Am. R. 405 (1874).) In another case a state statute gave school districts the discretion to design bus routes subject to judicial

review. A writ of manadmus was sought to require the district to send a vehicle to an Indian reservation to pick up children who otherwise would not be able to get to the public schools. The district argued that to provide the service would cost an average of $375 per year per child compared to the district-wide average for transportation costs of $49 per year per child. The California Supreme Court ruled that failure to provide the transportation denied these children of an education and that the high cost did not justify the denial of the bus service: There existed a compelling interest to get these children into school. (Manjares v. Newton, 49 Cal. Rptr. 805, 411 P.2d 901 (1966) (in bank).)

Second and more recently these provisions have been the basis for the now famous attack on the constitutionality of the educational finance scheme used in California. While this is not the place to go into a lengthy discussion of Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) some of the central features of this litigation as it pertains to the notion of a right to an education will be taken up. To begin, the California system of educational finance at the time of the decision noted above (and even after, the legislature modified the system shortly after the decision) relied heavily upon the use of a local property tax for raising local expenditures for education. Because of wide discrepancies in the amount of taxable property per pupil available in the various districts in the state, there were wide differences in the amount of property tax monies available per pupil from district to district. State aid did not make up these differences, hence, the amount of money spent per pupil in the districts was alleged to be a function of local district property wealth. The plaintiffs charged that to the extent inequalities in local expenditures were the result

of these differences in the available taxable property, these inequalities were unconstitutional under both the Equal Protection Clause of the 14th Amendment of the U.S. Constitution and then Article I, Section 21, now Article I, Section 7 quoted above of the State Constitution. The defendants demurred and the lower court dismissed the complaint.

On appeal from the dismissal of the complaint the California Supreme Court had to decide, assuming the facts alleged by the plaintiffs were correct, whether under with the state or federal constitutions a cause of action had been stated. An initial central question was the choice of a standard of review and two were available. Under the traditional or old standard of review in equal protection cases the plaintiff had the burden of showing the legislation was not rationally related to a legitimate state purpose. Under the newer standard of review the plaintiff had to establish that the legislation involved a "suspect classification" or a "fundamental interest." If that could be established then the burden shifted to the state to establish that its legislation was necessary to further a compelling state interest. In this case the California Supreme Court decided that the plaintiffs had established that the financial scheme involved both the use of a suspect classification and touched upon a fundamental interest. Hence the Court said the burden of proof shifted to the state, and that if the facts alleged by the plaintiff were correct, the state failed to demonstrate why the existing finance scheme was necessary to achieve a compelling state interest. Thus, the Court sent the case back to trial for a determination of the facts alleged by the plaintiffs.

Before turning to the trial court's findings we might elaborate on some of the important points in the opinion of the Supreme Court. First, as to

the question of a suspect classification, the Court found that in this case the suspect classification used was one of wealth. Assuming the plaintiff's facts were correct, the Court said that the amount of money spent on a child's education was clearly a function of the wealth of the school district in which the child happened to reside. Wealth was the determining factor. Further, assuming for purposes of deciding dismissal of the complaint that money affects the quality of education, the Court concluded that the quality of a child's education depended upon where he happened to live. Whether a child got a high or low quality education was importantly a function of the wealth of the school district.

Additionally, the California Supreme Court found that this scheme affected a fundamental interest of children -- their education. Apart from the findings of this Court that education was important not only from the self-interested viewpoint of the individual child but also from the viewpoint of the best interests of the society, the Court noted that in several earlier California cases education had been deemed important for those same reasons. Here the Court cited San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 92 Cal. Rptr. 309 (1971); Jackson v. Pasadena City School District, 59 Cal.2d 876, 31 Cal. Rptr. 606 (1963); Manjares v. Newton, 64 Cal.2d 365, 49 Cal. Rptr. 805 (1966); and Piper v. Big Pine School District, 193 Cal. 664, 226 P. 926 (1924). Beyond this the Court took note of Article IX Section 1, quoted above, to indicate that the populace of the state had also itself declared education to be of great importance.

With the conclusion that both a suspect classification and a fundamental interest were involved in the case the Court concluded that strict scrutiny of the existing system of educational finance was in order. Unless

the state could demonstrate that a compelling state interest was being served by the present finance system and that this present system was necessary to achieve that interest, the system must fall. In response the state argued that local control was the compelling interest being served by the heavy reliance upon the use of the local property tax. In response the Court said that, assuming decentralized financial decision-making was a compelling state interest, the fact was this state interest was not being served by the present arrangements. Property-poor local districts had no practical free choice in the amount of money they could raise for education. The existing system, assuming the alleged facts were correct, served to deprive local districts of the local choices the state said was such a compelling interest.

Thus, we see that the California State Constitution (as well as the Federal Constitution upon which the decision was also based) was read to support the notion that education was such a fundamental interest that the quality of a child's education could not be conditioned by the amount of local property wealth of the district where the child happened to reside. If violin lessons were available in one school district they could not be unavailable in another school district simply because of the differences in property wealth between the two districts.

After the decision by the Supreme Court in California had been rendered two things happened. The state legislature amended the finance system so that (1) the minimum level of money assured all districts by the state (based on a combination of local taxes and state aid) was roughly doubled, with a provision for gradual increase in the foundation over the years and (2) a gradually decreasing limit was placed on the revenue which could be raised by a school district through local property taxation, in the absence of

approval of increased rates by the districts voters (a voter override). The theory behind these changes was that over a period of years school spending by wealthy and poor districts would converge, would be squeezed, provided the voters of the wealthier districts did not approve any overrides. (Cal. Educ. Code Sections 17655.5-17665.5 (West Supp. 1974); Kenneth L. Karst, "California, Serrano v. Priest's Inputs and Outputs," 38 Law and Contemporary Problems 333, 335 (1974).)

The second development was the U.S. Supreme Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), a case in which the educational finance scheme of Texas had been challenged on the same theory as in Serrano. Only this time the plaintiffs lost when the Supreme Court found that the traditional equal protection test should apply rather than the newer equal protection test, and that under the old test the state system of finance was found not to be unconstitutional. The Court concluded that the old test applied because neither a suspect classification nor a fundamental interest was involved in the case. More precisely, the Court concluded that classifying children on the basis of district wealth, as opposed to their personal family wealth, did not amount to a suspect classification under the Court's precedents and that education when supplied in at least minimally adequate amounts (as all parties agreed was being done in Texas at the time despite the inequalities in the amount spent per pupil from district to district) was not a fundamental interest. Applying the old test the Court concluded that the present system of finance was rationally related to the legitimate state purpose of providing an adequate education while at the same time preserving local control. The existence of some inequalities in the ability of districts

to control their own expenditures -- inequalities arising out of the differences in local taxable wealth -- did not make the system so irrational as to be deemed unconstitutional. These considerations plus the fears the majority expressed with regard to the chaos that might result if the present system of finance was struck down, plus its sensitivity to the rights of the states to control their own system of taxation and finance, led the Court to refuse to get involved.

Thus when the Serrano case went back to the trial court for a determination as to the validity of the facts alleged in the original complaint and assumed to be true for deciding the demurrer by the California Supreme Court, the lower Court had to wrestle with two new problems. Did the decision in the Rodriguez case in effect nullify the decision by the California Supreme Court? Assuming the original Serrano decision remained good law, did the changes in the financial system in California mean that now the system was in compliance with the original Serrano decision. Briefly, the trial court concluded that the Rodriquez decision did not affect the original Serrano decision because that original decision, while in part based upon an interpretation of the U.S. Constitution -- an interpretation no longer valid in light of the Rodriguez decision, -- was also based upon the California State Constitution which the U.S. Supreme Court did not purport to construe. (Memorandum Opinion re Intended Decision at 33, Serrano v. Priest, Civil No. 938,254 (Cal. Super. Ct., April 10, 1971).) (It has to be understood that if the California State Constitution provided less protection to children than did the U.S. Constitution, then the U.S. Constitution would control -- to that extent the California Constitution itself would be unconstitutional under the U.S. Constitution. But in this instance the California

Constitution provided more protection than did the U.S. Constitution -- was more royal than the king -- and this is permissible. The U.S. Constitutution provides the minimum level of protection which must be afforded, not both the minimum and the maximum.)

Thus the trial Court concluded it must continue to be guided by the original decision in Serrano, and it turned to the impact of the amendments to the financial system. Here the Court found that during the time the amendments had been in effect there was no significant change in the wealth-based spending disparities to be found in the state and, as for the future, that "as long as the voted tax overrides are available to the voters of school districts, there is substantial probability that ... the present substantial disparities in per-pupil expenditures between school districts will never be diminished to any significant extent." (p. 74) In other words, the trial court concluded that the alleged wealth-disparities had been proven by the plaintiffs to exist.

The remaining factual issue which had not been decided by the California Supreme Court was the relationship between per pupil expenditures and the quality of the educational program. If there were no relationship between the disparities in money spent per pupil and the quality of the education, there would be no basis for complaining.

The trial court wrestled with two ways of measuring the quality of the school program -- an output standard based on using standardized tests to measure how well students are doing in reading and mathematics, and an input standard which measured the kinds and extensiveness of the school district offerings such a class size. These inputs could be viewed as the environmental conditions which provided students opportunities to learn:

unequal offerings meant unequal opportunities to learn. The trial court rejected the use of the output measure because it found that existing statistical methods of determining the extent to which the child's home, social class background or school factors made a difference in achievement were too unreliable. It was not possible with presently available techniques to determine the precise part these variables played in determining achievement hence it could not be precisely determined the extent to which money was related to quality in this sense. (p. 89) Instead the court accepted the output measure of school district offerings and concluded that disparities in expenditures did account for significant differences in school offerings. Money differences affected such things as (1) class size; (2) teacher quality; (3) curricular offerings; (4) length of the school day; (5) adequacy of materials and equipment; and (6) supportive services such as counseling services. (p. 95)

In sum, the California Supreme Court and the trial court concluded that the school program available in local districts was impermissibly a function of local taxable property wealth. More precisely and most significantly the trial court declared that disparities between school districts in per-pupil expenditures, apart from the categorical aids special-needs programs, that are not reduced to insignificant differences, which mean amounts considerably less than $100 per pupil, within a maximum of six years were unconstitutional. Additionally, variations in tax rates between school districts that are not reduced to nonsubstantial variations within the same maximum period were also unconstitutional. As one commentator noted, these conclusions would seem even to bar the legislature from using any system of school finance that results in differential school spending

from district to district which are not based on district wealth. Districts of equal wealth could not spend amounts that varied more than $100 per pupil even if one district wanted to support an elaborate and expensive program and the other district -- which could afford to do so -- did not want to do so. (Kenneth L. Karst, op. cit., p. 347) Thus, the trial court seems to have gone considerably beyond the original decision which only barred wealth-based differences not both wealth-based and politically-based differences. Whether this part of the trial court's opinion will stand on review remains to be seen.

What can be concluded, however, is that chances are the educational program available in the several districts of California will change. It might further be predicated that the higher quality programs will in all likelihood not be down-graded, but instead those districts whose program is now lower in quality will be improved. Educational offerings in those districts will become more diverse and those programs already in place will be more richly supported. Financial reform will mean curriculum reform.

The decisions discussed in this section have taken California an important step toward establishing a right to an education. A ground-work has been established for tackling other features of the system insofar as they impinge upon the emerging right to an education.

We turn now to a quick look at other provisions of the California State Constitution assuring people of certain rights.

Article I, Section 2:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Article I, Section 4:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety establishment of religion.
>
> A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

Article I, Section 7:

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.
>
> (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

Article I. Section 8:

> No public money shall ever be apportioned for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

The implications of these provisions for the rights of teachers and students will be taken up below. As will be seen California case and statutory law does not allow great scope for the exercise of individual rights within the context of the school: basic control of the curriculum remains in the hands of the state and local school boards. Teachers, for example, are specifically required by statute to adhere to the official curriculum and are subject to dismissal for failure to obey. (Cal. Educ. Code, Section 13556.)

As for religion in the public schools the Attorney General of the state opined prior to the famous U.S. Supreme Court prayer decisions that Bible reading in the public schools was unconstitutional under the California

Constitution. (Ops. Cal. Atty. Gen. No. 769, 1903; Ops. Cal. Atty. Gen. No. 53-266, 1955). The state courts did, however, refuse to strike down a released time program. (Gordon v. Board of Education of City of Los Angeles, 78 C.A. 2d 464, 178 P.2d 488 (1947).)

* * * * *

In summary, the California State Constitution has had an impact on shaping authority to control the curriculum in two ways. The constitutionally mandated arrangements among the state agencies -- legislature, State Superintendent, and state board -- has importantly affected the politics of the curriculum as will be taken up below. Secondly, the emerging notion of a right to an education will necessarily condition and affect educational policy-making not only with regard to the system of finance, but also as regards such matters as who is and is not eligible for this or that special program, and perhaps eventually which programs must as a constitutional matter be provided which children. (See Section VI below.)

II. Legislature

The state legislature is the most important force shaping the institutional arrangements for controlling the educational program. The work of the legislature can be divided up into five categories: (1) The further specification, beyond what the State Constitution provides, of the relationship of the participants in the educational system; (2) The establishment of administrative procedures according to which the system must operate; (3) Direct legislative control of the child's education by specification in statutes of which children should receive what kind of educational program; (4) The encouragement through many grants-in-aid of special educational

programs targeted to special children; (5) The establishment of compulsory education requirements.

(1) The legislature has outlined the following governing arrangements for the state public school system. A ten member State Board of Education, appointed by the Governor with the approval of two-thirds of the State Senate has been given general regulatory control over the state system. (Cal. Educ. Code, Sections 101, 152) The Superintendent of Public Instruction, who must be elected in a state-wide election as per the State Constitution (Article IX, Section 2), has been made the secretary and executive officer for the board. (Cal. Educ. Code, Section 105) Additionally the Superintendent "shall superintend the schools of this state." (Cal. Educ. Code, Section 253)

Beyond these constitutional officers, the legislature has created a Department of Education which has been given general duties with regard to collecting and disseminating information (Cal. Educ. Code, Section 371) as well as other more specific duties which are in provisions scattered throughout the educational code. The Department is headed by a Director of Education who is also the State Superintendent of Public Instruction. (Cal. Educ. Code, Sections 353, 354.)

Below the state level are the county superintendents and boards which have been given general supervisory duties over the local districts as well as authority to establish and run several different kinds of special education and vocational education programs. (Cal. Educ. Code, Sections 801, 802, 820, 887, 894, 895 (Pocket part).)

At the local level there exist a variety of different kinds of local districts, e.g., city school districts, high school district, union school

district. (Cal. Educ. Code, Sections 42-48) Subject to state law and the rules and regulations of the State Board and department of education these local districts have charge of their own educational program. (Cal. Educ. Code, Sections 7502, 7503, 8054, 8055.) But as we shall see below, more than in other states these local districts are told of what their educational program must consist.

(2) As will be detailed below, the legislature has provided for the means by which educational policy may be challenged in the courts. But additionally, more than any other state, the legislature has established specific procedures whereby which children are to be labeled, sorted, and classified. These procedures usually require the involvement of the child's parent at some point in the process, and frequently the parent is given a veto over whether the child is to be placed in a given program.

(3) The legislature has laid down the basic educational program for the schools of the state. Section 7502 provides:

> The legislature hereby recognizes that, because of the common needs of the citizens of this state and nation, there is a need to establish a common state curriculum for the public schools, but that, because of economic, geographic, physical, political and social diversity, there is a need for the development of educational programs at the local level, with the guidance of competent and experienced educators and citizens. Therefore, it is the intent of the Legislature to set broad minimum standards and guidelines for educational programs, and to encourage local districts to develop programs that will best fit the needs and interests of the pupils, pursuant to stated philosophy, goals, and objectives.

Then the legislature states the basic educational goals of the system:

> The Legislature hereby recognizes that it is the policy of the people of the State of California to provide an educational opportunity to the end that every student leaving school shall have the opportunity to be prepared to enter the world of work; that every student who graduates from any state-supported educational institution should have sufficient marketable skills for

legitimate remunerative employment; that every qualified and eligible adult citizen shall be afforded an educational opportunity to become suitably employed in some remunerative field of employment; and that such opportunities are a right to be enjoyed without regard to race, creed, color, national origin, sex, or economic status.

The basic educational program that must be provided in grades 1 through 6 is then outlined in Section 8551 of the Educational Code:

The adopted course of study for grades 1 through 6 shall include instruction, beginning in grade 1 and continuing through grade 6, in the following areas of study:

(a) English, including knowledge of, and appreciation for literature and the language, as well as the skills of speaking, reading, listening, spelling, handwriting, and composition.

(b) Mathematics, including concepts, operational skills, and problem solving.

(c) Social sciences, drawing upon the disciplines of anthropology, economics, geography, history, political science, psychology, and sociology, designed to fit the maturity of the pupils. Instruction shall provide a foundation for understanding the history, resources, development, and government of California and the United States of America; the development of the American economic system including the role of the entrepreneur and labor; man's relations to his human and natural environment; eastern and western cultures and civilizations; and contemporary issues.

(d) Science, including the biological and physical aspects, with emphasis on the processes of experimental inquiry and on man's place in ecological systems.

(e) Fine arts, including instruction in the subjects of art and music, aimed at the development of aesthetic appreciation and the skills of creative expression.

(f) Health, including instruction in the principles and practices of individual, family, and community health.

(g) Physical education, with emphasis upon such physical activities for the pupils as may be conducive to health and vigor of body and mind, for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period.

(h) Such other studies as may be prescribed by the governing board.

An additional Section 85551.1 adds that as to subdivision (c) of Section 8551, the study of social sciences shall provide a foundation for understanding the wise use of natural sciences. And Section 8553 further adds:

> Instruction in social sciences shall include the early history of California and a study of the role and contributions of American Negroes, American Indians, Mexicans, persons of oriental extraction, and other ethnic groups, and the role and contributions of women, to the economic, political, and social development of California and the United States of America, with particular emphasis on portraying the roles of these groups in contemporary society.

Elsewhere as to physical education in the elementary grades the legislature provides (Cal. Educ. Code, Section 8572.5):

> Notwithstanding the provisions of Section 8551 and 8572, instruction in physical education in an elementary school maintaining any of grades 1 to 8 shall be for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period.

Apparently this basic program all students must take since the language in Section 8551 reads the course of study "shall include instruction in...," but when we turn to the course of study for grades 7 through 12 the statutory language reads differently -- "course of study shall offer courses in ..." (Education Code,Section 8571). This difference between 8551 and 8571 is underscored by the fact that the legislature apparently felt it necessary to specifically require all 7-12th grade students to attend upon courses of physical education (Cal. Educ. Code, Section 8572) suggesting that absent such a specific requirement attendance would be optional.

At any rate the basic program to be made available in 7th through 8th grades is as follows (Cal. Educ. Code, Section 8571):

The adopted course of study for grades 7 through 12 shall offer courses in the following areas of study:

(a) English, including knowledge of and appreciation for literature, language, and composition, and the skills of reading, listening, and speaking.

(b) Social sciences, drawing upon the disciplines of anthropology, economics, geography, history, political science, psychology, and sociology, designed to fit the maturity of the pupils. Instruction shall provide a foundation for understanding the history, resources, development, and government of California and the United States of America; instruction in our American legal system, the operation of the juvenile and adult criminal justice systems, and the rights and duties of citizens under the criminal and civil law and the State and Federal Constitutions; the development of the American economic system including the role of the entrepreneur and labor; man's relations to his human and natural environment; eastern and western cultures and civilizations; and contemporary issues.

(c) Foreign language or languages, beginning not later than grade 7, designed to develop a facility for understanding, speaking, reading, and writing the particular language.

(d) Physical education, with emphasis given to such physical activities as may be conducive to health and to vigor of body and mind.

(e) Science, including the physical and biological aspects, with emphasis on basic concepts, theories, and processes of scientific investigation and on man's place in ecological systems, and with appropriate applications of the interrelation and interdependence of the sciences.

(f) Mathematics, including instruction designed to develop mathematical understandings, operational skills, and insight into problem-solving procedures.

(g) Fine arts, including art, music, or drama, with emphasis upon development of aesthetic appreciation and the skills of creative expression.

(h) Applied arts, including instruction in the areas of consumer and homemaking education, industrial arts, general business education, or general agriculture.

(i) Vocational-technical education designed and conducted for the purpose of preparing youth for gainful employment in such occupations and in such numbers as appropriate to the manpower needs of the state and the community served and relevant to the career desires and needs of the students.

> (j) Automobile driver education, designed to develop a knowledge of the provisions of the Vehicle Code and other laws of this state relating to the operation of motor vehicles, a proper acceptance of personal responsibility in traffic, a true appreciation of the causes, seriousness and consequences of traffic accidents, and to develop the knowledge and attitudes necessary for the safe operation of motor vehicles. A course in automobile driver education shall include education in the safe operation of motorcycles.
>
> (k) Such other studies as may be prescribed by the governing board.

The physical education provision referred to above provides (Cal. Educ. Code, Section 8572):

> All pupils, except pupils excused, shall be required to attend upon the courses of physical education for a total period of time of not less than 400 minutes each 10 schooldays. Any pupil may be excused from physical education classes during one of grades 10, 11, or 12 for not to exceed 24 clock hours in order to participate in automobile driver training. Such pupil who is excused from physical education classes to enroll in driver training shall attend upon a minimum of 7,000 minutes of physical education instruction during such school year.

Sections 461-463 require the Department of Education (a) to adopt rules and regulations securing the establishment of physical education in the schools, (b) to compile and distribute teachers' manuals, and (c) to exercise general supervision over the courses of physical education.

As for instruction in the social sciences other provisions provide that such instruction shall provide for a foundation for understanding wise use of natural resources (Cal. Educ. Code, Section 8571.1) and (Cal. Educ. Code, Section 8576):

> Instruction in social sciences shall include the early history of California and a study of the role and contributions of American Negroes, American Indians, Mexicans, persons of oriental extraction, and other ethnic groups, and the role and contributions of women, to the economic, political, and social development of California and the United States of America, with particular emphasis on portraying the roles of these groups in contemporary society.

While it might at first appear that high school students are

relatively free to develop their own educational program, the legislature has in yet another section severely limited the area of choice (Cal. Educ. Code, Section 8573):

> No pupil shall receive a diploma of graduation from grade 12 who has not completed the course of study and met the standards of proficiency prescribed by the governing board. Standards of proficiency in basic skills shall be such as will enable individual achievement and ability to be ascertained and evaluated. Requirements for graduation shall include:
>
> (a) English.
>
> (b) American history.
>
> (c) American Government.
>
> (d) Mathematics.
>
> (e) Science.
>
> (f) Physical education, unless the pupil has been exempted pursuant to the provisions of this code.
>
> (g) Such other courses as may be prescribed.

Beyond these state requirements the students must also comply with local minimum requirements for graduation. (Cal. Educ. Code, Section 8574).

Beyond these basis requirements other provisions of the code require that the course of study include instruction in a variety of special subjects:

> § 8503. The adopted course of study shall provide instruction at the appropriate elementary and secondary grade levels and subject areas in personal and public safety and accident prevention; fire prevention; the protection and conservation of resources, including the necessity for the protection of our environment; and health, including the effects of alcohol, narcotics, drugs, and tobacco upon the human body.
>
> § 8504. Instruction upon the nature of alcohol, narcotics, restricted dangerous drugs as defined in Section 11901 of the Health and Safety Code, and other dangerous substances and their effects upon the human system as determined by science shall be included in the curriculum of all elementary and

> secondary schools. The governing board of the district shall adopt regulations specifying the grade or grades and the course or courses in which such instruction with respect to alcohol, narcotics, restricted dangerous drugs as defined in Section 11901 of the Health and Safety Code, and other dangerous substances shall be included. All persons responsible for the preparation or enforcement of courses of study shall provide for instruction on the subjects of alcohol, narcotics, restricted dangerous drugs as defined in Section 11901 of the Health and Safety Code, and other dangerous substances.

Drug education gets yet another push in "The Drug Education Act of 1971." (Cal. Educ. Code, Section 8751) This act requires that instruction be given in the elementary and secondary schools on the effects of the use of tobacco, alcohol, narcotics and dangerous drugs and other dangerous substances. The instruction is to be sequential through all the grades. (Cal. Educ. Code, Sections 8753 and 8752)

Many other provisions imposing prohibitions with regard to the curriculum are also included in the code and will be taken up below as will several sections which grant specific permission to local districts to provide certain courses and programs. But a good way of rounding out our understanding of the extensiveness of the legislature's control over the educational program in the public schools is to take note of the vast pupil classification scheme which a general review of the educational code reveals:

1. Students in Grades 1 through 6.

2. Students in Grades 7 through 12.

3. Students classified as non-English speaking or of limited English-speaking ability. (Section 5761.2)

4. Students who are educationally handicapped. (Section 6750)

5. Students classified as mentally retarded. (Section 6901ff)

6. Physically handicapped students. (Section 6802ff)

7. Students' placed in courses substituted for regular program. (Section 5801)

8. Children with learning handicaps or behavioral disorders. (Section 36300)

9. Mentally gifted students. (Section 6421ff)

10. American Indian students. (Section 521)

11. Migrant children. (Section 6464)

12. Students classified as disadvantaged minors. (Section 6452)

13. Autistic children. (Section 6750.1)

14. Children found to be dependent on drugs. (Section 8766)

15. Students assigned to the following kinds of schools and classes:

a. Opportunity schools and classes. (Section 6502ff)

b. Adjustment schools. (Section 6653ff)

c. 24 Elementary schools. (Section 6701)

16. Students who have been accepted into the following kinds of schools:

a. Occupational Centers. (Section 7451)

b. Technical, agricultural and natural resource conservation schools. (Section 6720)

17. Students exempted from the compulsory education laws. (Section 12152)

The programs related to these categories of students will be taken up below. Also taken up below will be the various procedural requirements that legislature has required when classifying children.

(4) To a greater extent than the other states studied the California legislature has favored shaping the educational program of the public schools by the device of the grant-in-aid. Grants are available for the following

kinds of programs and purposes: reading (Sections 5770, 6490); math (Sections 6490, 7497); early childhood education (Section 6445ff); school improvement with community involvement (Section 6499.31ff); drop-out provention (Section 6499.51ff); disadvantaged youth programs (Section 6499.230); program evaluation (Section 6499.200); individualized instruction (Section 8075); and educationally disadvantaged children (Sections 553, 6254, 6472). It might be noted, however, that these grants did not prevent the educational finance system of the state from being found to be unconstitutional. (Serrano v. Priest, op. cit.; Memorandum Opinion re Intended Decision, Serrano v. Priest, op. cit.)

One point which is most interesting about the grant-in-aid program is that their many requirements can cause difficulties for local districts. Thus the Supplementary Education Act of 1971 upon approval by the State Department of Education permits school districts to consolidate money obtained under the federal statutes, the Miller-Unruh basic reading act, compensatory education legislation and legislation supporting education for certain handicapped children, as long as these pupils are included in the new so-called "supplementary education program." By consolidating the money the legislature apparently hoped among other things to eliminate the segregation of these pupils and the plethora of labels which stigmatize the children. The law seems designed to loosen the definitions of these classifications so as to take into account the many children who are "not adequately served because they do not fit neatly into one of the existing categories." (Cal. Educ. Code, Section 36000(d).) But most ominously Section 36013 provides that:

> A school district or county superintendent of schools establishing a supplementary education program prescirbed in

> this division may waive restrictions or limiting provisions of this code which relate to special education programs affecting class size, schoolday, eligibility requreiments, placement procedures, program organization, curriculum requirements, and teacher-administrator ratio, upon approval of the Superintendent of Public Instruction.

Thus, the many legislative requirements which had been established in order to protect children, e.g., procedures to be followed in classifying pupils, may be dropped altogether by a district with the consent of the Superintendent of Public Instruction. (Written consent of parents before placement is still required, however.) And as will be described below, this change is no insignificant step as the legislature has provided for many important and significant procedures for the protection of children, which may now be waived. Similarly, it is to be noted all curriculum requirements may also be waived. In short, what the legislature has done is with regard to children from minority groups and other children now classified as mentally retarded, educationally handicapped and physically handicapped, is to open the door to virtual repeal of the educational code upon agreement between the local district and the State Superintendent. This striking power is granted with no guidelines to constrain its exercise and may itself be unconstitutional as a delegation of legislative authority. (See Section I.A.(1) above.)

The requirements imposed on this program are minimal: a school psychologist, or qualified special education specialist, or a special education consultant must provide four hours a week of consultation with the special teacher in the program; individual pupil evaluation as well as program evaluation are called for as well as an educational plan. (Cal. Educ. Code, Sections 36201 through 36206.) Children are to have available special services to include teaching, physical remediation and

psychological consultation. (Cal. Educ. Code, Section 36208) Parents are to be involved in planning the program. (Cal. Educ. Code, Section 36209)

What we have here then is the possibility of local districts obtaining greater control over their program than heretofore was possible. Along with this local discretion is a lowering of the safeguards that had been built into the law to protect pupils. The program seems to be a natural response to the complaints districts must have lodged with the state legislature about the way legislation and categorical aid programs had begun to restrict their scope.

(5) Finally we might note that as in the other states studied the legislature has established compulsory education requirements which affect both the student and his parent. (Cal. Educ. Code, Section 12101 et seq.) As will be discussed more fully below, these provisions have implications for the private schools operated in the state.

In sum, the work of the California legislature is in broad outline much like that of the work of the legislatures in the other states with several notable exceptions to be developed more fully below. More than the other states the California legislature has spelled out the content of the basic education program to be made available in the schools and to be taken by the students. The detail of the California code is like the detail usually found only in the regulations issued by the state agencies in the other states. The emphasis upon using grants-in-aid is greater in California than in the other states. And the procedural requirements that must be followed in classifying and labeling children are by far and away more detailed than those of any other state studied. A feature of those requirements is the extent of parent involvement, and in

this and other respects parents are given more recognition in the California code than perhaps any state except Florida with its statutory requirement for the establishment of parent advisory councils. All this is clear evidence of the tremendous importance the legislature plays in educational politics in California.

III. State Agencies

A. State Agency Relationships

The plan for this section is to begin with a short discussion of the relationships between the state board, state superintendent and department of education and then to turn to a more detailed discussion of the functions assigned to each. As was noted the department of education is under the control of the state superintendent who is himself a state-wide elected official. Thus the superintendent is a political figure who may tend to reflect the educational views of certain segments of the California population more than other segments. The former superintendent, Max Rafferty, was a clear example of this phenomenon with his emphasis upon basic education, traditional teaching methods, and moral instruction.

The state board of education which is appointed by the governor and confirmed by the state senate may or may not represent the same political-educational viewpoint of the superintendent. In fact it is unlikely that the state board will reflect exactly the viewpoint of the state superintendent for several reasons. The ten members of the board serve four year terms which are staggered and a complete turn-over in board membership can only occur over a four year period. (Cal. Educ. Code, Section 102) Thus while the governor of the state could within this period reconstitute the board

so as to bring it into line with the superintendent, the process takes some time to accomplish. Further, the governor himself may not reflect the same constituency as the superintendent and for this reason his appointments may not reflect the preferences of the superintendent. And the governor must always face the possibility of rejection by the state senate of his nominees -- it will be recalled it takes a two-thirds vote of approval in the senate. (Cal. Educ. Code, Section 101)

The possibility for the existence of a difference of opinion on educational policy between the board and the superintendent, thus, is real and has been in the past the source of good newspaper copy, particularly during the superintendency of Max Rafferty. The political relationship between the board and the superintendent is made more complex by legislation. Not only is the state superintendent the secretary and executive officer of the board, but he is legally under the direction of the board despite the fact of his independent political base: (Cal. Educ. Code, Section 252)

> The Superintendent of Public Instruction shall execute, under direction of the State Board of Education, the policies which have been decided upon by the board and shall direct under general rules and regulations adopted by the State Board of Education, the work of all appointees and employees of the board.

Furthermore, while he is also the State Director of Education in whom resides all executive and administrative functions of the department, it is the State Board of Education which "shall be the governing and policy determining body of the department." (Cal. Educ. Code, Section 352) The extraordinary difficulties which can arise under this arrangement in which the superintendent is a constitutional officer elected by the state populace but placed by legislation under the direction of the state board is illustrated in a problem taken to the Attorney General of the state by the

then Superintendent Rafferty.

The difficulty between the board and superintendent arose over a bill pending in the legislature which would have required the state board to maintain a list of recommended textbooks instead of adopting one or more basic textbooks as presently required by the state constitution. The bill by its own terms would not have become operative unless the voters approved an amendment to Article IX, Section 7 of the Constitution. (The former provision now appears in Article IX, Section 7.5). The board opposed the bill and adopted a resolution that "the executive officer of the Board, Dr. Rafferty, be directed to make known to the Legislature the Board's opposition to the Winton Bill and its reasons therefor." Rafferty who opposed the board's position on the bill went to the Attorney General and asked whether he had the legal right to refuse to execute the order of the board and in fact whether he could lawfully support the bill which the board opposed? Rafferty also asked what remedy the state board might have if he refused to carry out the order? And he asked whose orders must an officer or employee of the department of education follow if given contradictory orders by the state board and superintendent?

The Attorney General recognized that the problem of the relationship of board and superintendent was one with a long legal history. He then turned to the question of whether the superintendent as a constitutional officer had certain inherent duties and powers and concluded that he did not. The powers and duties of the superintendent had not been specified in the Constitution and were subject to delineation by the legislature. Thus the opinion turned to an outline of the various statutory provisions bearing on the problem. This led the Attorney General to the conclusion that

the legislature had made the state board of education the ultimate governing and policy making body for the department of education.

Turning to the specific question at hand a further examination of the statutes led to the conclusion that the board was well within its statutory powers publicly to oppose the pending bill. (Cal. Educ. Code, Section 158) Further, the board being made up of a group of individuals who serve without pay other than receiving their actual and necessary traveling expenses could not be expected personally to present its position to the legislature and it may require the superintendent to carry out its resolution. But, here the Attorney General side-stepped the ultimate question. He found that the resolution itself and the minutes of the board meeting did not reflect an intent on the part of the board that the superintendent personally perform the action which might be contrary to his own personal beliefs. He was only asked in this case to make sure that someone in the department did go to the legislature with the board's point of view. The question of whether the board could require the superintendent himself to go before the legislature was left unanswered. The Attorney General did go on to say that if the board had designated a particular office, division, or bureau to carry out its resolution, then the order of the board must prevail over a possible contrary order of the superintendent.

As for a possible remedy against a disobedient superintendent the Attorney General again avoided answering the question on the ground it was a hypothetical problem. But he did point out that there was no constitutional way of removing the superintendent other than by recall. Perhaps the only recourse for the board would be to seek a writ of mandate from the courts thereby confronting the superintendent with a possible charge of contempt

of court if he still refused to act. (See Section IV below.)

Finally, however, the Attorney General did say that the superintendent was free to express his own opinion on the bill -- but in this case he would be speaking only as superintendent and not for the board or department. (41 Atty. Gen. Opps. 105 (1963).)

We thus have no authoritative resolution of the relationship between the board and superintendent. The heart of the problem is that, apparently, the board might be able, if it chooses, legally to force the superintendent into following its policy lead, but that the superintendent, all the while, could openly attack and disavow the policy he was being forced to carry out. The board, in other words, could not "gag" the superintendent. Further, since the board is made up of part-time lay people whereas the superintendency is a full-time paid position, it seems the occupant of the superintendency clearly retains the upper-hand in any political infighting that may occur. Since he is an elected official too, it seems likely the legislature would listen more closely to what the superintendent is saying than to what the governor's appointees on the board may be saying. In short, the board may have the legal authority but the superintendent probably enjoys more political influence with the legislature.

We should also note, however, that occasionally the shoe is on the other foot and it is the superintendent who hopes to obtain compliance from the board with regard to policies that the superintendent favors. This problem arose in connection with Rafferty's support of new state regulations on moral education in the schools. Of course in this situation the superintendent is in a position to marshall political support throughout the state and in the legislature; nevertheless Rafferty was ultimately unable to

get the board to adopt a position on moral education in the schools that reflected his conservative-religious viewpoint. The final document to emerge from the board dealing with moral education was roundly condemned by Rafferty's supporters and praised by liberal groups. (For a fascinating account of the battle over moral instruction in the schools, see Dinah Shelton and Daniel A. Clune, "The Politics of Morality: A History of California's Guidelines for Moral Instruction," Childhood and Government Project, University of California, Berkeley, (Mimeo).)

The legislature for its part has assured itself of an oversight role with regard to education by requiring the board and superintendent to make periodic reports to it as well as the governor. (Cal. Educ. Code, Sections 158, 262, 266, 479) Of course the legislature also maintains control through the annual budget process by which means it can even exert an indirect control over the kind of textbooks which will be purchased, even though it cannot constitutionally specifically prohibit that specific books be bought or not be bought. (State Board of Education v. Levitt, op. cit.) Thus in one case that went to the Attorney General for his opinion the legislature not only placed budgetary limitations on the amount of money that could be spent on the purchase of new texts but also established a formula for calculating the maximum amount of money that could be spent on a series of textbooks. The result of the formula was to preclude the board from purchasing textbooks from three publishers who were going to charge prices that exceeded the amounts allowed by the formula. And at the time the legislature drafted the formula it already knew that the department of education had planned to buy those textbooks. The Attorney General concluded the limitation was constitutional. (35 Atty. Gen.'s Opp. 152 (1960).)

Another device that the legislature has developed to influence state board and superintendent is the development of a system of advisory commissioners. Section 575 of the education code states the legislative intent:

> The Legislature hereby declares that there is further need to encourage the adoption of new or improved educational ideas, practices, and techniques in solving critical educational problems in preschool, elementary and secondary schools throughout the state. Recognizing the need for the planning and developing of new programs involving a wide range of new approaches designed to improve the quality of education available in this state, this chapter is expressly enacted to foster innovation and create change in education, based on research and proven need. It is the intent of this chapter to bring purposeful change and experimentation to schools throughout the state, through the use of all available resources of the state.
>
> The Legislature further finds that there are in existence a large number of permanent commissions, committees and councils, some of which have overlapping duties and functions, and some of which have been perpetuated beyond the original need or purpose for which created. In order to provide a more economical, efficient and logical structure to educational policymaking, it is the intent of the Legislature to create three levels of educational advisory bodies: educational policy advisory commissions, educational advisory committees, and educational task forces.

Following up on this the legislature created an Educational Innovation and Planning Commission; the Curriculum Development and Supplemental Materials Commission; the Educational Management and Evaluation Commission; the Equal Educational Opportunities Commission; an Advisory Commission on Special Education; and an Advisory Committee on Educational Research in Basic Educational Programs. Those bodies relevant to control of curriculum will be briefly described.

The Educational Innovation and Planning Commission is to have one member from the assembly and senate plus 15 others appointed by the state board of education upon the recommendation of the superintendent.

These 15 people are to be representative of certain interests -- special education, higher education, urban education, school boards, private schools, disadvantaged people, private industry, the counseling profession are among the interests represented. The members from the legislature appointed to the commission "shall have the powers and duties of a joint legislative committee on the subject of educational innovation and planning..." (Cal. Educ. Code, Sections 576, 576.1) The basic function of the commission is to review and approve projects seeking funding from Title III of the Elementary and Secondary Education Act of 1965 as amended. (20 U.S.C.A. Sections 841 et seq.) The legislature has here intruded into the commission's work by laying down certain criteria the project must meet (Cal. Educ. Code, Sections 580 and 580.1):

§ 580 Priority for experimental, demonstration, and operational projects shall be given to the following:

(a) A language development program or a mathematics program, or both, given in the elementary grades. For purposes of this article, "language development" includes the elements of reading, writing, spelling, speaking, and listening, and comprehension of ideas and concepts.

(b) An in-service and preservice training program for elementary teachers developed with local institutions of higher education. Such programs shall emphasize the improvement of specific classroom teacher skills required to instruct language development and mathematics.

§ 580.1 In order to be deemed an approved project and be eligible to receive an allocation from the State Board of Education, an experimental, demonstration, and operational project shall meet the following criteria:

(a) The proposed activities are not activities presently being performed by other state and federal programs.

(b) The proposed activities supplement, but do not supplant, other state and federal categorical aid programs under Title I or Title IV of the Elementary and Secondary Education Act of 1965,[1]

[1] 20 U.S.C.A. §§ 1001 to 2022; §§ 1061 to 1089.

the Preschool Educational Programs (Chapter 2.5 [commencing with Section 16150] of Part 4 of Division 9 of the Welfare and Institutions Code), the Miller-Unruh Basic Reading Act (Chapter 5.8 [commencing with Section 5770] of Division 6 of the Education Code), or the McAteer Act (Chapter 6.5 [commencing with Section 6450] of Division 6 of the Education Code).

(c) Priority shall be given to districts with elementary schools which have the largest concentrations of pupils whose reading achievement scores fall within the first quartile, as measured by the most recently administered statewide reading test, such as the Miller-Unruh Basic Reading Test, or any other applicable statewide reading test.

(d) The school district is shown to be making a reasonable local tax effort.

(e) A description of methods of evaluation. Priority shall be given to school districts which indicate a comprehensive evaluation proposal.

Additionally the state board may reserve a limited sum of money to support certain experimental projects and the state board may reserve not more than 5% of the state's federal allocation for incentive grants for school districts which have operated exemplary projects. The districts getting this extra money must use it to expand and adapt their projects. (Cal. Educ. Code, Sections 580.2, 580.3, 582.1)

The Curriculum Development and Supplemental Materials Commission must consist of a member from the state assembly and one from the state senate; a public member appointed by the Speaker of the Assembly and one appointed by the Senate Committee on Rules; one public member appointed by the Governor and 13 to be appointed by the State Board upon recommendation of the superintendent. At least seven of the 13 public members appointed by the state board should be experts in English, social science, foreign languages, science, mathematics, fine and applied arts and conservation education. The members of the legislature who serve on the commission

have the powers and duties of a joint legislative committee. The purpose of the commission is upon request of the State Board to "recommend to the State Board of Education the adoption of minimum standards for courses of study in preschool, kindergarten, elementary, and secondary schools. Courses of study in the public schools shall conform to such minimum standards when adopted." (Cal. Educ. Code, Sections 583-583.8)

The Educational Management and Evaluation Commission structured in a manner similar to the previous commission is given the task of assisting and advising the State Board in program evaluation, in determining cost effectiveness of programs, and in making recommendations as to how the cost effectiveness of programs might be improved. (Cal. Educ. Code, Sections 584-584.6)

The Equal Educational Opportunities Commissioner, also structured like the other commissions, is to formulate policy recommendations to insure equal educational opportunities for all students and to effect statewide coordination of programs for education of disadvantaged minors. (Cal. Educ. Code, Sections 585-585.6)

Following the same organizational pattern is the Advisory Commission on Special Education which is to provide advice on research, program development and evaluation in special education. (Cal. Educ. Code, Sections 586-586.6)

All nine members of the Advisory Committee on Educational Research in Basic Educational Programs are to be appointed by the Superintendent of Public Instruction. The powers and duties of this committee are those which the former Educational Innovation Advisory Commission had as spelled out in Section 32014, and discussed above in Section I, B. (Cal. Educ. Code, Sections 587-597.17)

The members of these various commissions and committees all serve without compensation and are without a staff of their own. The Superintendent of Public Instruction serves as the executive secretary. These institutional arrangements make clear that the power of these commissions is bound to be limited. First, the members of these commissions from the state legislature and appointed by the governor can act as "diplomats" from these other institutions of government sent to the state board and superintendent. Thus these commissions can be an arena in which bargaining over policy can take place informally. Secondly, these bodies can serve as sounding boards for the superintendent if he so chooses to use them in this way. That is, ideas can be brought to these bodies for reaction before they are made public. Third, they can serve as legitimating bodies -- giving approval to policies and proposals developed by the superintendent and his staff. Fourth, they can serve as a way of placing pressure on the superintendent and the board. Members of the commission who may be opposed to state policies now have an official platform from which to express their opposition.

While the commissions may serve all these functions, whether they in fact serve any or all depends importantly upon the personalities involved. There are no responsibilities which the commissions must carry out each year upon pain of some penalty, legal or political, thus if anything happens with the commissions depends upon the willingness of the participants to make use of these forums. Any given board and superintendent may find these advisory bodies useful for furthering their policies or only an annoying gadfly that can embarrass but not formally block policy.

What we do see in California is that the school curriculum is deeply involved in the political processes at the state level. In this

respect California is more like Arizona than any of the other states studied. Indeed judging by the amount of legislation on the books dealing with the curriculum itself, the California legislature is more deeply involved in shaping the school program than any of the states studied.

B. Regulation

Section 152 gives the state board of education the following authority:

> The board shall adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state, and (d) for the government of such other schools, excepting the University of California and the California State University and Colleges, as may receive in whole or in part financial support from the state.
>
> The rules and regulations adopted shall be published for distribution as soon as practicable after adoption.

Beyond this general authorization the state board and department of education other statutory provisions empower and require them to issue standards, regulations and rules with regard to physical education, driver education, bilingual education, work experience education, and education for the mentally and physically handicapped. (Cal. Educ. Code, Sections 461, 493, 494, 1085, 5761, 5986, 6750.1, 6802 et seq., 6902.05 et seq., 6931.)

The state board has authority to suggest minimum academic standards for graduation -- standards which local districts may consider in fulfilling their statutory obligation to develop their own minimum standards for graduation. (Cal. Educ. Code, Sections 8574 and 8575) This authority only to suggest minimum standards is a change from a prior version of the section which had given the state board the authority to mandate the minimum statutory requirements. This change in the law implies some ability on the

part of local districts to obtain a legislative cut-back in state board power. As broad as these grants of authority appear there is an important limitation -- the state board apparently may not prescribe the basic course of study to be followed in the public schools. That power is left to the legislature which as we have seen above has exercised that power with some vigor. Indeed the legislature has specifically arranged the relationship between the local boards and the state board in the following way. First, the legislature itself has imposed the basic curriculum program to be followed in the state. Second, it has given the state board authority to regulate, pursuant to Section 152 quoted above, but regulation means in this context merely prescribing the mimimum standards to be followed by the local district when carrying out the prescribed program. This point is underscored by Section 583.8 which provides that the Curriculum Development and Supplemental Materials Commission shall recommend to the board minimum standards for courses of study and the courses of study in the public schools shall conform to such minimum standards when adopted. Hence the board has authority to establish only the minimum standards to be followed. We get further confirmation of this point by the absence of any explicit grant of authority to the state board to shape the basic course of study while we do have such an explicit grant of authority with regard to the local districts. (Section 8502)

> In addition to the course of study requirements set forth in this chapter, the governing board of any school district may include in the curriculum of any school such additional courses of study, courses, subjects, or activities which it deems fit the needs of the pupils enrolled therein. .

However, the approval for such additions in grades 7 through 12 must be obtained from the state board. (Cal. Educ. Code, Section 8055). Thus

the state board is given the chance to review additions to the course of study only in grades 7 through 12 and the power granted here is only the power to approve or disapprove not the power to initiate what the course of study will be in the first place. This analysis gains further confirmation from the Attorney General of the state who wrote: "It has never been contended that the authority given the board by Section 152 to adopt rules and regulations 'not inconsistent with the laws of the State .. for the government of the day and evening elementary schools...' carries with it the power to prescribe the course of study." (39 Atty. Gen. Opp's 101, 107 (1962))

This discussion of the exact scope of state board power over the course of study in the public school leads into the question of the permissive versus restrictive nature of the educational code in California. Section 2 of the entire Education Code states that:

> The code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

The language of this provision suggests that the code is to be taken as a permissive code, i.e., a fairly liberal approach should be taken to the finding of implied powers within the code rather than presuming that unless an explicit grant of authority exists, the power does not exist. However, as indicated the Attorney General's approach to construing the educational code is not so liberal as to lead him to a finding of important new powers for the state board. Yet the approach of the Attorney General in construing the powers of the state board is not wholly restrictive. In several opinions construing the scope of state board authority with regard to textbook selection,

the Attorney General has said that no provision of law prohibits that board from adopting a textbook covering one or more subjects or adopting a textbook for several grades and this may be done even in the absence of express authorization (8 Ops. Cal. Atty. Gen. 92; 39 Ops. Cal. Atty. Gen. 105 (1962).) In brief the approach taken by the Attorney General has been "liberal" but not to the point of implying major new powers on the part of the board.

When we turn to construing the scope of authority of local districts we find that the tendency in statutory construction is different. With regard to those provisions the inclination is to construe the law more strictly, more in line with a restrictive concept of the code. This difference in approach is in keeping with the different approach the legislature has taken with regard to the state and local levels of government. With regard to the state, the grants of authority tend to be in general terms and more limited in number; as for the local level the legislature has taken great pains specifically and explicitly to authorize everything the local districts may do. Hence the implication arises that the state agencies have been given generous implied authority but local agencies may only act if given explicit authority. This dual approach on the part of the legislature is one way of reconciling possible conflicts in authority between state and local agencies.

Given that the state board is precluded from prescribing the basic course of study -- a power which we found the Board of Regents in New York may have been given -- how has the state board gone about regulating the local districts? We provide here a brief review of the work of the state board. The fact is that within its powers the state board has acted with considerable vigor only in certain limited areas. For example, the state regulations on one course, driver education, cover four pages of small print

and outline course content, eligibility of pupils, standards for the automobiles used, accident report forms and standards for driver education and laboratory phase of driver education. The regulations with regard to handicapped children run for almost eighty pages. (Title 5 Cal. Administrative Code Division 3, D-97 et. seq.) None of the other states studied had regulations as comprehensive and detailed as the California regulations in these limited areas.

Further, the list of topics on which the state has issued regulations is like that found in the other states studied. The following represent some of the areas touched upon: driver education; physical education; the education of the handicapped; curriculum for pregnant minors; special reading and mathematics programs; graduation credit; the classification of pupils; state-wide testing; flag rituals; teacher preparation in the U.S. Constitution; moral supervision; affirmative action; use of state approved textbooks and regulations for various experimental programs. (See generally Title 5 Cal. Administrative Code.)

But having said all this we must recognize that the regulations, as extensive as they are, do not touch upon the basic educational program in the schools. The regulations concentrate upon such courses as driver education, physical education and special education but neglect to say much of anything with regard to English, mathematics, and so on. In these fundamental areas the state board has failed to exercise its powers.

C. Grants-In-Aid

As previously mentioned, more than any of the other states studied California has moved in the direction of relying upon special grants-in-aid. The list of such grants includes the following: conservation education

(Section 568.9); early childhood education (Section 6445); reading (Section 5770); math (Sections 5779, 7497.7); bilingual education (Section 5762); education of the mentally gifted (Section 6421); education to prevent potential drop-outs from dropping out (Section 6499.51); program evaluation (Section 6499.201); vouchers for handicapped children (Section 6770); and for individualized instruction (Section 8075). Additionally, the state department administers and is expected and does vigorously administer the federal grants in a manner that is considerably different from both Massachusetts and New York. In California the state department has taken seriously the problem of making districts conform to both federal and state guidelines. (Studies of the administration of federal grants have been undertaken in California, Michigan, Massachusetts, Texas, Virginia, and New York, and are reported in Joel S. Berke and Michael W. Kirst, eds., Federal Aid to Education (Lexington, Mass.: D. C. Heath and Company, 1972).)

Thus, in California at least the grant-in-aid system can contribute to the shaping of educational priorities of the local districts. This is in contrast to the findings of other studies which have concluded that grants-in-aid frequently do serve the purposes of the granting agency but end up being "misused" to serve the priorities of the recipient. (David O. Porter and David C. Warner, "How Effective Are Grantor Controls: The Case of Federal Aid to Education," in Kenneth E. Boulding, Martin Pfaff and Anita Pfaff, eds., Transfers in an Urbanized Economy (Belmont, Ca.: Wadsworth Publishing Co., 1973)

D. Textbook Selection

The control of the selection of textbooks and other instruction materials for grades one through eight is placed in the hands of the state while local districts may choose their own materials for high schools. (The terms elementary school and high school are defined in the code:

Cal. Educ. Code, Sections 9231 and 9323). We turn first to a discussion of the selection of materials for high school and then to selection by the state for the elementary grades.

School districts selecting textbooks for use in high school must comply with certain requirements when it comes to the selection of "textbooks." (Cal. Educ. Code, Section 9600) The state board has been given the authority for designating the kinds of books which are to be classified as textbooks; as to those materials not classified as textbooks, local districts may purchase these materials without reference to the requirements imposed on textbooks. (Cal. Educ. Code, Section 9601) This authority in the hands of the stateboard is considerable because as the board expands and contracts the definition of the term textbook, it broadens and contracts the range of materials to which the statutory provisions controlling the definition of the term is a significant delegation of authority, but the legislature has provided some assistance with the task by defining the term textbook as that term is to be used in connection with state selection of materials for the elementary grades. For those purposes textbook means a book designed for use by pupils as a source of instructional material, or a teacher's edition of the same book. (Cal. Educ. Code, Section 9223) This in itself is hardly a limited definition except to the extent it insists on the materials in question constituting a "book" as opposed to any sort of pamphlet, or audio-visual materials.

What definition has in fact the state board adopted? No definition of textbook for purposes of 9601 was found in the administrative code but the following definition for purposes of Section 10001 of the Educational Code was found in the regulations (Title 5 Administrative Code Section 9582):

> In accordance with the provision of Section 10002, Education Code, the State Board classifies instructional materials used in high schools as follows:
>
> (a) Textbooks. A textbook is a volume intended for use by pupils and meeting in style, organization, and content, the basic requirements of the course for which it is intended. The term textbook shall be construed as including literary works, collections of literary works and literary selections; collections of musical selections that are designed for instructional purposes; and laboratory manuals.
>
> (b) Materials Not Textbooks. The following instructional materials are not classified as textbooks.
>
> (1) Teacher's manuals
> (2) Library books of all kinds.
> (3) Supplementary books. A supplementary book is defined as one covering part or all of the course affected, that is not intended for use as a textbook but is intended to supply information not found in the textbooks but is intended for the course.
> (4) Maps, atlases, charts, and similar apparatus.
> (5) Test materials, drill and exercise books, forms, and blanks.

(Section 10001 of the Education Code has been repealed.)

It is interesting to contrast the definition of textbook as it appears in the regulations dealing with state selection of materials for elementary schools (Title 5 Administrative Code, Section 18550): " 'Textbook' means basic textbooks, supplementary textbooks, and teacher's manuals for use in the elementary schools." The differences in these definitions has significant implications. First, vast amounts of the materials used in the high schools are not subject to certain content restrictions to be outlined below, but almost everything used in high schools would be if the definition in the regulations for elementary schools were applied to high schools. Second, the differences in the definitions give an indication of the sweep of state control over materials in the elementary schools -- supplementary materials and teacher's manuals are all to be selected by the state board.

What then are the content restrictions with which the narrowly defined concept of high school textbooks must comply? Two of the most important restrictions follow: (Cal. Educ. Code, Sections 9240 and 9243):

§ 9240 When adopting instructional materials for use in the schools, governing boards shall include only instructional materials which, in their determination, accurately portray the cultural and racial diversity of our society, including:

(a) The contributions of both men and women in all types of roles, including professional, vocational, and executive roles.

(b) The role and contributions of American Indians, American Negroes, Mexican Americans, Asian Americans, European Americans, and members of other ethnic and cultural groups to the total development of California and the United States.

(c) The role and contributions of the entrepreneur and labor in the total development of California and the United States.

§ 9243 No instructional materials shall be adopted by any governing board for use in the schools which, in its determination, contains:

(a) Any matter reflecting adversely upon persons because of their race, color, creed, national origin, ancestry, sex or occupation.

(b) Any sectarian or denominational doctrine or propaganda contrary to law.

As if these two provisions were not sufficient, Section 9002 also bars the state board or any local district board from adopting materials which adversely reflect upon people because of their race, sex, color, creed, national origin or ancestry. Additional restrictions and requirements are (Cal. Educ. Code, Sections 9240.5, 9241, 9242, 9244):

§ 9240.5 When adopting instructional materials for use in the schools, governing boards shall include only instructional materials which accurately portray, whenever appropriate:

(a) Man's place in ecological systems and the necessity for the protection of our environment.

(b) The effects on the human system of the use of tobacco, alcohol, narcotics and restricted dangerous drugs as defined in Section 11901[1] of the Health and Safety Code and other dangerous substances.

[1]Repealed 1972. See, now, Health and Safety Code § 11032.

§ 9241 When adopting instructional materials for use in the schools, governing boards shall require such materials as they deem necessary and proper to encourage thrift, fire prevention and the humane treatment of animals and people.

§ 9242 When adopting instructional materials for use in the schools governing boards shall require, when appropriate to the comprehension of pupils, that textbooks for social science, history or civics classes contain the Declaration of Independence and the Constitution of the United States.

§ 9244 All instructional materials adopted by any governing board for use in the schools shall be, to the satisfaction of the governing board, accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels.

This last provision needs to be read in connection with Section 9426 which requires publishers and manufacturers "to develop plans to improve the quality and reliability of instructional materials through learner verification," in accordance with regulations of the state board of education. This section also requires governing boards be encouraged to permit publishers and manufacturers to have limited access to classrooms for necessary testing and observation. (Cal. Educ. Code, Section 9426) "Learner verification means the continuous and thorough evaluation of instructional materials for their effectiveness with pupils." (Cal. Educ. Code, Section 9234)

Only books of publishers which comply with all these requirements may be adopted by school districts for their high schools.

Several points about these requirements are worth noting. First the application of these standards, especially Sections 9240 and 9243, is extremely difficult to accomplish as many of the terms in these provisions are extremely hard to define in workable terms. For example, when does a textbook reflect adversely upon a person because of their race, color, creed, national origin, ancestry, sex, or occupation? Is the depiction of Shylock in the Merchant of Venice an adverse reflection upon him because of his

Jewish religion? Secondly, it is interesting to note that these requirements do not apply, if the definition in regulation 9582 is to be used for Section 9601 of the code, to testing materials used in high school. Hence there is nothing in the code itself which prevents the use of tests which reflect adversely upon people because of their natural characteristics. Finally, the learner verification requirement merely stipulates that the publishers, from whom books may be purchased, must "develop plans" to improve the quality and reliability of instructional materials through learner verification. The publishers with whom the school district does business need not actually have subjected his materials to the learner verification process.

Florida has also included a learner verification requirement in its textbook selection law. As was discussed in connection with Florida there are many problems with regard to learner verification. With regard to whose educational goals are the materials to be assessed and developed: the publishers' goals, the states, the school districts, the teachers? Further, since different publishers are likely to use different techniques of learner verification, how can public decision-makers be in a position to make comparisons between books in terms of their tendency to foster learning? One would be comparing research results based on very different methodologies. And can a given textbook be "learner verified" regardless of the teacher and method of using the materials? That seems doubtful; there will be so many variables affecting the efficiency of a given book that to claim this book more than others will produce results seems to be a claim few could make with any certainty. (We know too little about what gets children to learn to say the process of learner verification will work.)

As for enforcement of these requirements apparently the only statutory word on this question are Sections 9245 and 9246:

§ 9245 Any governing board may conduct an investigation of the compliance of any instructional materials which it adopts with the requirements of this article.

§ 9246 In the event that after the good faith acquisition of instructional materials by a governing board, the instructional materials are found to be in violation of this article and the governing board is unable to acquire other instructional materials which meet the requirements of this article in time for them to be used when the acquired materials were planned to be used, the governing board may use the acquired materials but only for that academic year.

Beyond this, parents or taxpayers objecting to the books selected by the school board must turn to the courts. As will be discussed below there is some doubt that much help will be forthcoming from the courts.

We turn now to state selection of materials for elementary schools. All the requirements with which local districts must comply in selecting textbooks also apply to the selection of instructional materials by the state board. It is interesting to note, however, that there is no requirement that only books from publishers who are developing plans to improve the quality of their books through learner verification can be purchased. Indeed the statutory provision establishing the information which must be submitted to the Curriculum Development and Supplemental Materials Commission before it makes its recommendations to the State Board does not include a reference to learner verification. (Cal. Educ. Code, Section 9404) And to date the state board of education has not issued its regulations on learner verification.

The basic statutory provision regarding the selection of texts follows: (Cal. Educ. Code, Section 9400)

The state board shall biennially adopt a list of textbooks and instructional materials for use in the elementary school grades subject to the following provisions:

(a) The state board shall adopt not less than five but not more than 15 of any of the following, per subject, per grade: (1) instructional materials, (2) instructional materials systems, (3) instructional materials sets, (4) a combination of instructional materials, instructional materials systems, and instructional materials sets. The state board may designate each instructional materials, instructional material system, instructional material set, or any combination thereof, as basic or supplementary. The state board shall not adopt more than two instructional materials sets per subject.

(b) Fewer than five instructional materials, instructional materials systems, and instructional materials sets may be adopted per subject, per grade if publishers and manufacturers of instructional materials do not submit a sufficient number of educationally useful materials or systems, as determined by the state board; however, in no event shall the state board adopt less than two basic instructional materials systems per subject, per grade.

(c) In the event that a district board establishes to the satisfaction of the state board that the adoption of basic instructional materials does not promote the maximum efficiency of pupil learning in the district, the state board shall authorize that district board to use its instructional materials credit to purchase, through the Department of Education, additional instructional materials specified by the state board in accordance with standards and procedures established by the state board.

(d) The state board shall biennially adopt lists of instructional materials for the following subjects: (1) language arts, (2) arithmetic, (3) social sciences, (4) reading, (5) science, and (6) any other subject in which the board shall determine the need and desirability for instructional materials to promote the maximum efficiency of pupil learning. The state board may establish a cycle for adoptions by designating subjects to be adopted in even-numbered years and subjects to be adopted in odd-numbered years.

(e) The state board shall, at the time of the adoption, determine the date upon which state-adopted instructional materials shall be available for use by district boards.

(f) The state board may adopt instructional materials, instructional materials systems, and instructional materials sets without designating a grade or subject and the state board may designate more than one grade or subject whenever the state board determines that a single subject designation or a single grade designation

would not promote the maximum efficiency of pupil learning. Any materials so designated may be placed on a single grade or single subject list or may be placed on separate lists including other materials with similar grade or subject designations; however, all materials so designated shall be adopted subject to the numerical limitations of subdivision (a).

The terms used in this provision are defined in the sections quoted below (Cal. Educ. Code, Sections 9221 et. seq.):

§ 9221 "Instructional material" means all materials designed for use by pupils and their teachers as a learning resource and which help pupils to acquire facts, skills, or opinions or to develop cognitive processes. Instructional materials may be printed or nonprinted and may include textbooks, educational materials and tests.

§ 9221.3 "Basic instructional material" means instructional materials designed for use by pupils as a principal learning resource and which meet in organization and content the basic requirements of the intended course.

§ 9221.5 "Supplementary instructional materials" means instructional materials designed to serve, but not limited to, one or more of the following purposes, for a given subject, at a given grade level:

(1) To provide more complete coverage of a subject or subjects included in a given course.

(2) To provide for meeting the various learning ability levels of pupils in a given age group or grade level.

(3) To provide for meeting the diverse educational needs of pupils with a language disability in a given age group or grade level.

(4) To provide for meeting the diverse educational needs of pupils reflective of a condition of cultural pluralism.

§ 9222 "Instructional materials system" means a comprehensive collection of related instructional materials which are designed to improve learning in one or more subjects and are so designed that all parts of the system are necessary to produce the results intended.

§ 9222.3 "Instructional materials set" means a collection of related supplementary instructional materials produced and submitted as a set by a single publisher or manufacturer and which are so designed that each part of the set is related to the same subject;

however, not all parts of a set shall be necessary to promote the maximum efficiency of pupil learning in that subject. All parts of a set shall have a common educational purpose and methodology, and each part of a set shall be identified, marked, or imprinted with a common title or name.

§ 9223 "Textbook" means a book designed for use by pupils as a source of instructional material, or a teachers edition of the same book.

§ 9224 "Educational material" means any audiovisual or manipulative device including, but not limited to films, tapes, flashcards, kits, phonograph records, study prints, graphs, charts and multi-media systems. Educational materials do not constitute equipment as defined in the California School Accounting Manual.

§ 9225 "Test" means any device used to measure the knowledge or achievement of students.

The scope of authority granted by these provisions to the state board is considerable. First, these provisions give to the state board power to prescribe what is authorized with regard to basic and supplementary materials for courses which are mandated by state statute and for any other courses which the school districts may adopt. Section 9400 (d)(6) makes this last point very clearly. Second, by being able to designate what constitutes a "basic" text the state can make school districts use certain materials more than others. This is made clear by the state board regulation Section 9520 which requires from a governing board written certification that "all basic textbooks adopted by the state board for grades maintained in the school have been used as a principal source of instruction in the respective grades and subjects for which they were adopted." But this last requirement, it should be noted, seems to conflict with a statutory provision Section 9463 which states in pertinent part: "District boards may order instructional materials from lists adopted by the state board without regard to the subject or grade designated by the state board and may use such instructional materials in any manner which will promote the

maximum efficiency of pupil learning." Hence, this provision seems to suggest books designated for use in grade 5 may be used in grades 4 or 6 by the local district. Section 8051 which requires local boards to use textbooks and other instructional materials prescribed by the proper authorities does not clarify the apparent conflict or what exactly is the obligation and the power of the state board.

We further note that the state board can prescribe what supplementary materials must be used, however, this requirement does not seem to preclude local districts from using yet other supplementary materials not approved by the state board. The regulation quoted above refers only to basic textbooks and Section 9464 of the Educational Code specifies how instructional materials not adopted by the state are to be ordered by the school district -- implying authority to use nonauthorized materials. Whether the local districts can use supplementary materials entirely of their own choosing ignoring the state approved materials is not made clear by the statutes or regulations. Section 8051 of the Educational Code, which imposes the obligation to enforce use of textbooks and other instructional materials, makes no reference to the distinction between basic and supplementary materials. Hence a district might be in full compliance by using approved basic texts but non-approved supplementary materials.

Some further flexibility is built into this system on behalf of local districts by the statutory requirement with regard to the minimum number of adoptions per grade and subject. In this way districts are assured of some choice and not limited to a single approved text. As matters work out, in any event, there is a tendency toward more inclusive rather than selective adoptions.

Section 9400 and the definitional provisions establish the ultimate task of the state board, and it is to the process to be followed in the selection of materials that we now turn. The Curriculum Development and Supplementary Materials Commissioner mentioned above begins the book selection process. It has been given the following duties: (Cal. Educ. Code, Section 9494)

> The commission shall:
>
> (a) Recommend curriculum frameworks to the state board.
>
> (b) Develop criteria for evaluating instructional materials submitted for adoption so that the materials adopted shall adequately cover the subjects in the indicated grade or grades and which comply with the provisions of Article 3 (commencing with Section 9240) of Chapter 1 of this division. Such criteria shall be public information and shall be provided in written or printed form to any person requesting such information.
>
> (c) Study and evaluate all instructional materials submitted for adoption.
>
> (d) Recommend to the state board instructional materials which it approves for adoption.

To aid its work the commission may set up task forces pursuant to Section 9405:

> The commission may, in order to fulfill its duties pursuant to Section 9404, appoint task forces or committees of subject matter experts to assist and advise them. Each task force or committee appointed by the commission shall include classroom teachers as defined in Section 321 and representatives of the various ethnic groups and of the various types of school districts. Accurate records of the advice and recommendations of each task force or committee member shall be maintained by the commission, and made available to the state board at its request.

Once the commission has reached a recommendation the state board is required by Section 9403 to give the commission a public hearing before adoption of any materials.

Having publicly received a recommendation from the advisory

commission the state board now must make the final selections. By statute before there can be a final selection all textbooks proposed for adoption and not currently listed must be made available for public inspection for 30 days at display centers designated by county superintendents of schools. The statute also specifies a minimum number of such centers shall exist in certain counties. (Cal. Educ. Code, Section 9402) The board must hold a public hearing before making any adoption. (Cal. Educ. Code, Section 9403) The state board regulations also provide a mechanism by which any person can submit to the board a written statement respecting any textbook recommended by the Curriculum Commission. These regulations also specify the occasion and conditions under which oral comments can be made by members of the public. (Title 5 Cal. Ad. Code, Sections 18533 - 18538)

These provisions provide the basic outline of the procedure but not the political flavor of the selection process. Armin Rosencranz, a lawyer and political scientist with the Childhood and Government Project, School of Law, University of California, Berkeley, has studied that process and concluded there are a handful of important actors in the process: publishers and other pressure groups. The other participants only react -- state board, Curriculum Commission, evaluators working for the Curriculum Commission, teachers, parents and school officials. (Letter dated August 20, 1974, from Armin Rosencranz to Arthur Block.) In an article written for the Los Angeles Times Rosencranz develops this theme by describing the massive lobby efforts undertaken by the publishers directed toward the Curriculum Commission members, teachers and school officials. His article also recounts that apparently for the first time an active effort was made by a coalition of minority and women's rights organizations

to force the Curriculum Commission and ultimately the state board to comply with Sections 9240 and 9243 of the education code, quoted above. The efforts of these groups, who were represented by a public interest law firm, have to be considered a failure as the Commission "time and again" restored to the matrix materials which had been judged illegal by the commissions own screening committee. Indeed, while Rosencranz does not say so directly, he hints that the close relationship that develops between members of the commission and the publishers creates opportunities for an abuse of the public trust. Only one Commissioner has actually refused to see publishers or to accept favors from them.

Regardless of how political the process of selecting materials for the state list, local districts are required to use only state approved materials. (Cal. Educ. Code, Section 8051) And teachers are by statute also required to use only legally authorized textbooks. (Cal. Educ. Code, Section 13,556)

E. Information and Evaluation

California, perhaps more than any other state has taken an interest in the collection of information and in the evaluation of the school program. Throughout the code there are numerous provisions dealing with evaluation, reporting and information collection. Special programs for Indiana students, non-English speaking, the deaf, handicapped, mentally retarded, and programs for children with "exceptional" needs all have reporting and evaluation requirements attached. (Cal. Educ. Code, Sections 530, 894.2, 5761.8, 6445.5, 6461, 6812.7, 6902.10, 6943, 7025, and 7026)

Beyond these requirements tied to specific projects are other

provisions relating to the entire educational program. Sections 471 et. seq. enable the state board to establish a system for collecting information about the entire school system. (Cal. Educ. Code, Section 471 et. seq.) The purpose of these provisions is stated in Section 471:

> It is the intent of the Legislature in enacting this article to make complete, current, and reliable information relating to education available to the Legislature and to all public educational agencies in California at maximum efficiency and economy through statewide compatibility in the development and application of information systems and electronic data processing techniques insofar as they relate to data required in reports to the Department of Education.

The other sections stress that what is to be achieved is a system for gathering, storing, retrieving, and disseminating information. The state board and department are given the power to determine what information is to be collected and in what format. The data so collected are useable for educational research, for decision-making, and for facilitation of preparation of reports, among other uses. As in the case of Florida these provisions give the state the authority to collect building-by-building information which can be of use in making sure that the right programs are being offered to the right children. These laws, in a word, give the state the authority to monitor and thereby to be in a better position to enforce state curriculum requirements.

Additionally the code establishes a variety of reporting requirements that are imposed upon the state superintendent, county superintendent, local superintendents, principals and teachers. These requirements establish yet another system for collecting information. (Cal. Educ. Code, Sections 866, 803, 5780, 12848, 13529, 13563-1366413566, 13567)

Finally we must take note that California has also adopted a

state-wide pupil and program assessment system. There exist four kinds of assessment programs in the state: annual achievement testing in grades 6 and 12; annual physical testing program; annual basic reading testing in grades 1, 2, and 3; and program evaluation efforts undertaken on an ad hoc basis. Pursuant to Section 12823 the state board has required that each year the districts maintaining grade 6 and/or 12 shall administer to all pupils in those grades an achievement test in basic skills selected by the state board. (Cal. Educ. Code, Section 12823; Title 5 Cal. Administrative Code, Section 1021) The school districts are required to report on a school-by-school basis to the Department of Education the results of the tests. And district-wide results must be reported back to the school district. (Cal. Educ. Code, Section 12826 as amended by Chapter 930 (1972).)

Section 12827 Requires districts in March, April, or May each school year to administer to each pupil in those grades designated by the State Board a physical performance test designed to measure physical fitness. Upon request of the Department of Education the district is to submit once every two years the results of its physical performance testing. (Cal. Educ, Code, Section 12827 as amended by Chapter 930 (1972).)

And Section 12840 gives the state board the authority from time to time to conduct studies of the effectiveness of the courses offered in the public schools. The results of these studies are to be reported to the Governor and legislature and the analysis "may" be in terms of type of district organization, geographic area, socioeconomic data, size of school district, or other variables that may prove useful. (Cal. Educ. Code, Section 12840 et. seq. as amended by Chapter 930 (1972).)

Sections 5779 et. seq. require the state board to require that

uniform tests be administered to each pupil in grade 1 in learning and memory, attention, vidual perception and auditory comprehension. In grades 2 and 3 the test required is in reading. (Cal. Educ. Code, Section 5779). This provision states that any test used in grades 2 and 3 shall be in national use and nationwide norms shall have been developed for the test. But in Section 5780.2 the state is required to develop its own tests. These two provisions are read together to mean that while the state may adopt its own, for example, objectives in reading it must select commercial test items which had been normed on a national sample. Hence in developing its own tests the state determined its objectives through an examination of its own curriculum materials and through an examination of reading objectives submitted to the state by over 200 school districts. Test items were obtained from major test publishers and then screened and selected by a state committee. (1 Feedback: Newsletter of the New California State Testing Program no. 3 March 1974) Tests were developed in a similar way for grades 6 and 12. (Survey of Basic Skills, Grade 6 (California State Department of Education, 1975); Survey of Basic Skills, Grade 12 (California State Department of Education, 1975).

The purpose of this system of tests is to assess educational programs and not to assess individual pupils. Further, by collecting base line data on the pupils as they enter the first grade between district comparisons are made possible. Districts which have pupils entering the first grade at about the same level of achievement can compare how well their students are doing at grades two and three. The base line data also provides the state with the capability of predicting what the test scores of the pupils in the first grade in the various districts should be in grade three. Then,

when those pupils reach grade three it can be determined if they achieved as predicted or better or worse. These predictions will take into account other factors such as socioeconomic factors and financial resources of the community. (1 Feedback: Newsletter of the New California State Testing Program No. 2 (May 1973).)

Section 12848 requires that the Department of Education submit an annual report to the legislature of the results of the various testing programs. The section states that the analysis of the data may include but need not be limited to a consideration of the following variables: demographic, financial, pupil and parent characteristics, instructional and staff characteristics, and special funding. (Cal. Educ. Code, Section 12848) To this end a variety of background factors were collected by the state, e.g., occupation of pupil's father; primary language of the child; average class size; a variety of socioeconomic factors for the communities; and school tax rate, property values per pupils and expenditures per pupil for instruction.

The results of the tests in grades 2, 3, 6, and 12 are reported by school district in one form. Grades 2 and 3 are given one test each in reading; grades 6 and 12 are tested in reading, language, spelling, and mathematics. The form reports the average score for the district on, for example, the second grade reading test. The district's percentile rank in the state is given, e.g., 24th percentile means 24 percent of the districts had a lower average score on second grade reading. Also given is the predicted range for the percentile rank, e.g., 28-49 might be the predicted range having taken into consideration the various background factors. Thus a percentile rank of 24 means the district did not achieve a ranking as high as was predicted. A letter code then indicates if the actual percentile rank, in this case 24,

was (A) above, (B) below, (W) or within the predicted range. Next follows a graphic presentation of where the district fell with regard to the predicted ranking. Then follows an important piece of information which gives a rough indication of the variance of average building scores within the district. The number of buildings in the district falling at each percentile rank is given, e.g., 2 buildings in the 30th percentile, 11 at the 50th, two at the 75th percentile.

The bottom of the report contains information on the background factors of this district: average class size, racial composition, etc. These figures are in terms of average, means, percents, etc. State percentile ranks on each variable are also listed.

A second form reports similar data for each building in the state only in this case only the results of the basic reading test for grades two and three are reported as well as certain background data. Again the data are reported in terms of means test scores for the nation, state, district and building. A state percentile rank is given for the building as well as the predicted percentile rank in terms of a range. But the report also goes on to break out the results of the testing in terms of the objectives tested for. One vocabulary objective is stated as follows (California State Department of Education, "Basic Objectives for California State Reading Tests for Grades 2, 3, 6, and 12," (Sacramento: 1974)):

> "Given a phrase or a sentence with one word underlined and a set of 3-5 alternatives, the student will select the alternative that indicates the correct meaning using the semantic content of the phrase or sentence."

Mean test scores and a percentile rank are then provided for each of these sub-skills under the general heading vocabulary. Finally this report provides

data on background factors of the school: entry level test scores, socio-economic level, percent bilingual, and extent of pupil mobility.

There is a striking difference between the kind of reports issued in California and Florida. In Florida test results are given item by item with no overall average figure offered for the state, district, or school building. The tests were not based on national norms so there was no way to compare the students with a national sample. In California the tests rely on test items with national norms and the results are reported only in averages for the nation, state, district, and building. There is a further break out on one report in terms of four major objectives but this hardly approaches the detail of the Florida report which reports test results on hundreds of objectives. And the California system provides percentile ranks for districts and school buildings and then compares that district or building with what it was predicted to have done based on a consideration of certain background factors.

What these differences point to is the power of the legislature and state department of education in California to subject local districts to a system of testing which encourages comparative evaluations. In Florida every effort was made to avoid such comparisons and in fact the way the data are reported making comparisons becomes an impossibility. Thus we have here an indication of the ability of state level agencies in California to shape educational policy without being checkmated in the process by local resistance.

A further point is interesting to note. While Florida has coupled its testing scheme with mandatory public reporting requirements -- each year principals in all schools must issue an annual report covering student achievement as well as other matters -- such a reporting requirement does not exist

in California. The data are not secret and are presumably public information but there is no legislative requirement that an affirmative effort be made to get the results out to the public. Perhaps this is so because in California the data in the form reported are politically more sensitive.

If the data do get to the public it is likely to be a catalyst forcing the districts to concentrate upon improving student achievement as measured by the standardized tests used in the state assessment program. It is unlikely that parents and taxpayers will sit still for long when they find that they are paying taxes somewhat higher than other places, but achieving results which are below equivalent districts and perhaps that are even below what has been predicted for the district. The political pressures this system build up could be quite strong.

F. Other Activities

There are several other program related activities in which the state board and department of education engage. First, the department is expected to provide assistance in developing course materials. Several sections of the code require the provision of assistance with regard to conservation education, consumer economics, and drug education. (Cal. Educ. Code, Sections 567.2, 8113, 8755, 10,000) Secondly, the department in some instances operates its own educational programs such as innovative schools, Indian education centers which supplement what is available in the regular public schools, and pilot programs for handicapped children. (Cal. Educ. Code, Sections 587.4, 527, 7001 et. seq.) The state superintendent and department are also expected to carry on educational research and to try out experimental programs. (Cal. Educ. Code, Sections 262, 6445)

* * * * *

The California state agencies are among the most powerful we have studied if not the most powerful with regard to curriculum. While in New York the Board of Regents has been given "legislative" power over the public school system, it does not use the power that has been granted to it. The Florida state agencies are especially sensitive as a political matter to local sensibilities. In Arizona we saw that the state agencies have had pretentions to strong control over the system and in some respects have managed such. In California we see a coming together of both formal authority and apparently real power as manifested in the strong control over federal grant-in-aid programs and in the state wide assessment system. But even here complete use of available authority has not been undertaken as evidenced by the lack of state regulations over the basic education program.

IV. Courts

A. Writ of Mandate

The writ of mandate which is the California name for the writ of mandamus is the primary vehicle for obtaining judicial review of administrative actions. (Cal. Code of Civil Procedure, Sections 1084, 1085). The basic framework within which the courts must operate in determining if the writ should be issued is provided by Section 1094.5 of the Code of Civil Procedure. This provision in pertinent part states:

> (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

The California Supreme Court has interpreted this section to mean that the

Courts have been given the authority to determine on a case-by-case basis which cases require the exercise of independent judgment on review and which call for only a substantial evidence review of the entire record. (Bixby v. Pierno, 4 C.3d 130, 481 P.2d 242, 93 Cal. Rept. 234 (1971) (in bank).) The independent review presumably means something less than a full trial de novo and yet something more than the sort of difference for an administrative judgment required by the substantial evidence standard of review. (For an outline of the substantial evidence standard of review see Kenneth Culp David, Administrative Law Text, (St. Paul, Minn.: West Publishing Co., (1972) and Section IV of the review of New York Law.) That is, the court is expected to conduct what has been termed a "limited trail de novo" in which it exercises its own independent judgment as to the weight of evidence, and perhaps with regard to the inferences to be drawn from the evidence of record. (Bixby v. Pierno, op. cit., note 10, p. 243 in Cal. Reptr.) Errors of law are reviewed in the same way in all cases.

The stricter review permitted by Section 1094.5 is triggered if the reviewing court determines that the agency's actions affect "vested, fundamental rights." In determining if the right is fundamental the court considers the economic aspect, as well as the effect of the right in human terms and the importance of it to the individual in the life situation. (p. 244) The extent to which the right is vested means the extent to which it is already possessed by the individual.

A further factor apparently affecting the scope of review is the question whether the agency action is quasi-judicial or quasi-legislative. If the action was quasi-legislative then it is subject to a very limited judicial review to determine if the action was arbitrary, capricious, entirely

lacking in evidentiary support or otherwise unlawful. (Bixby v. Pierno, op. cit., p. 238, 2 in Cal. Rept.)

It might also be noted that while the statutory language does not say so expressly, these statutory provisions do apply to local units of government such as school districts. (Ibid.)

Thus California has not adopted a single formula for the scope of review in mandamus of state and local agencies. The theory is that this approach to judicial review will better protect the rights of individuals. Hence, in California the opportunity seems to exist for obtaining court intervention into school curriculum matters if it can be shown that a vested, fundamental right is at stake. And as we have seen, the Supreme Court of California has already declared that education is a fundamental interest of children -- a sufficiently fundamental interest to trigger strict judicial review under the Equal Protection Clause of the California State Constitution. Of course in that case the whole of the child's schooling from elementary grades through high school was involved and affected by the state policy. Whether the courts would find the existence of a fundamental interest in a case involving an attack on a single course or program is another matter. Indeed to the extent any precedent exists reflecting how courts might handle a question of educational policy, the indications are that they would prefer not to get involved. Thus, in one of the few cases found that even approached curriculum policy the court relied upon the usual abuse of discretion standard of review and declared that the question was a matter within the discretion of the school. In that case a student sought a reversal of the school's decision to dismiss him from medical school. (Wong v. Regents of University of California, 93 Cal. Rept. 502, 15 Cal. App. 3d 384 (1971).) One might have

argued that a stricter standard of review was warranted in this case than was forthcoming on the ground that the person's future livelihood was at stake. Here he had already been admitted to medical school, hence the right in question was vested in the same way it would be vested in the situation of a license revocation proceeding. (see Bixby v. Pierno, op. cit., p. 245 in Cal. Reptr.) On the other hand, this case might be viewed as the quintessence of a problem involving an agency's initial determination whether an individual is qualified to enter a profession. Hence, in that sense the right has not vested. (Ibid.)

This last case casts considerable doubt then on how vigorous the review would be in the California courts with regard to a challenge to a curriculum policy decision that did not involve a constitutional issue. For example, a claim that the school had abused its discretion in classifying a pupil would seem to trigger only the normal lenient standard of review. While something fundamental is at stake here -- the labelling and stigmatizing of the child -- it seems no more fundamental than loss of access to the medical school with its consequential stigma and loss of money and time. Apart from the classification problem, the prospects for getting vigorous review diminish further if the court construes the case as involving a quasi-legislative matter, e.g., the adoption of a particular course or failure to adopt a particular course. That sort of exercise of judgment by the district is likely to be left by the courts to the district. (cf. Arthur v. Oceanside-Carlsbad Jr. College District, 31 Cal. Reptr. 177, 216 CA 2d 656 (1963)

What might be the chances of obtaining judicial review under Sections 9240, 9243, and 9002, quoted above, imposing certain anti-discrimination requirements on the schools. Here we have the legislature spelling out in

rough terms what would constitute an illegal act in the curriculum area. For example, reflecting adversely upon a person because of their sex, color, creed, national origin, ancestry, sex or occupation seems to touch upon a fundamental interest on the part of a parent and his child not to be discriminated against by government especially when such discrimination can hurt the hearts and minds of the children in a way that is likely never to be undone. (Brown v. Board of Education, 347 U.S. 483 (1954).) It would seem on-balance that in this area the chances for obtaining judicial review and review with a stricter standard of review are reasonably good. What the outcome of such a review would be is another matter as the words of the statute "reflecting adversely" are not without difficulty in defining.

Some of the other requirements of these sections may be more difficult to get enforced. Thus in Section 9243 the word "propaganda" is also undefined. The terms of 9240 require that school materials accurately portray the role and contribution of men, women, minority groups, labor and business to our society; this section opens a can or worms that courts might try their best to avoid getting involved in. But perhaps a failure of materials accurately to portray the role of men and women, and the minority groups could be construed as amounting to an adverse reflection on these groups. If this is so, then perhaps the courts might be more willing to get involved.

B. Dismissal of Teachers

The educational code in California provides for judicial review of the dismissal of teachers but there is a sharp distinction between the protection afforded the tenured and probationary teacher. The tenured teacher may only be dismissed for one of a number of specifically listed reasons,

such as immoral or unprofessional conduct, dishonesty, incompetency, evident unfitness for service, persistent violation of or refusal to obey the school laws, conviction of any one of several specified Penal Code violations or of any felony or of any crime involving moral turpitude. (Cal. Educ. Code, Section 13403.) While many of these grounds for dismissal are vague leaving the school district with considerable discretion, the grounds for dismissal of probationary teachers is such that almost anything can count as justification. Section 13443 (d) provides:

> The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and pupils thereof...

The long and the short of these provisions is that even if a dismissal of a teacher is viewed as affecting a fundamental right triggering stricter review, the teacher is not likely to be very well protected when it comes to matters of curriculum policy. The school board and state have the right to lay down basic policy and teachers are obliged by statute to uphold that policy. (Cal. Educ. Code, Section 13556) Hence any teacher who wants to formulate policy on his or her own faces dismissal and little court protection. Thus, unless the case can be turned into a question of a constitutional right to academic freedom, the teacher remains exposed to rather strong controls.

The California courts are in a position under the state statutes and under their own doctrines to exercise an important influence over the curriculum policy in the state. Whether the courts will in fact exercise the authority they have at their disposal, however, seems more doubtful.

V. County Superintendent and Board

A county based unit for controlling education is provided for in the State Constitution as has been previously noted. (Article IX, Section 3, and Section 7). Pursuant to these provisions there is to be an elected county superintendent and either an elected or appointed county board as determined by the legislature. The legislature has provided for the election of county boards. (Cal. Educ. Code, Section 601.1) The county board has the responsibility of adopting rules and regulations governing the administration of the office of the county superintendent. (Cal. Educ. Code, Section 653(a).) The general duties of the county superintendent are stated in the following provision (Cal. Educ. Code, Section 801):

> The superintendent of schools of each county shall:
>
> (a) Superintend the schools of his county.
>
> (b) Visit and examine each school in his county at reasonable intervals to observe their operation and to learn of their problems. He may annually present a report of the state of the schools in his county, and of his office, including but not limited to his observations while visiting the schools, to the board of education and the board of supervisors of his county.
>
> (c) Distribute all laws, reports, circulars, instructions, and blanks which he may receive for the use of the school officers.
>
> (d) Keep in his office the reports of the Superintendent of Public Instruction.
>
> (e) Keep a record of his official acts, and of all the proceedings of the county board of education, including a record of the standing, in each study, of all applicants for certificates who have been examined, which shall be open to the inspection of any applicant or his authorized agent.

Beyond this, besides operating several important educational facilities -- discussed momentarily -- the county superintendent has the responsibility of enforcing the basic course of study in the schools. These responsibilities are provided for in Section 802:

The county superintendent of schools shall also:

(a) Enforce the course of study.

(b) Enforce the use of state textbooks and of high school textbooks regularly adopted by the proper authority.

(c) Preserve carefully all reports of school officers and teachers.

(d) Deliver to his successor, at the close of his official term, all records, books, documents, and papers belonging to the office, taking a receipt for them, which will be filed in the office of the county clerk.

He is also expected to make annual reports to the state superintendent when required. (Cal. Educ. Code, Section 803)

Additionally the superintendent is empowered to help promote and improve the educational program in the districts within his county in a variety of ways: carry on research; disseminate information; provide consultative and coordinating services; and help school districts prepare courses of study and carry on program planning. (Cal. Educ. Code, Sections 820, 822, 886, 886.1, 886.2, 6454)

More tangible assistance is also provided by the county superintendent to the local districts. This can take the form of a contract with local districts to provide at local district expense supervision of instruction and attendance as well as health services, and guidance services. (Cal. Educ. Code, Sections 887 et. seq., 888 et seq.; 889, 890) Apparently these services can also be provided without charge to the districts, if the county board approves. Also arrangements can be made for the county superintendent to provide certain library services for local districts in lieu of those services being offered by the county library system. (Cal. Educ. Code, Section 891 et. seq.) Finally the county can agree to maintain facilities which provide audial and visual materials which local districts might only have to pay one

half the cost depending on the agreement reached with the county board and superintendent. (Cal. Educ. Code. Section 892 et. seq.) Many of these services can only be provided to the smaller school districts within the county.

The county board also is authorized to provide direct services to children. For physically handicapped pupils the services can consist of, for example, special schools or classes which are to be centrally located, or the provision of teachers to the regular schools to teach these children. (Cal. Educ. Code, Section 894 (1975 Pocket Part).) Similarly the county board is authorized to provide schools and special classes for mentally retarded children. (Cal. Educ. Code, Section 895 (1975 Pocket Part).)

And the county is authorized to establish a variety of schools to handle children who have been committed to these schools by order of the juvenile court; children who are in danger of becoming habitually truant; and children who have been committed to the schools by their parents and/or who are in need of special educational training and discipline because of their insubordinate conduct. Some of these facilities are only day-care in nature but one such type of school is termed a 24 hour elementary school. (Cal. Educ. Code, Sections 6502 et. seq.; 6653 et. seq.; 6701 et. seq.)

Various forms of vocational and technical training and guidance facilities may also be operated by the county boards. (Cal. Educ. Code, Sections 6720, 7451, 7467)

Thus the county unit while serving as a supervisory unit to enforce the regular school program in the local districts, has the primary function of providing special services and programs which many districts may either be too small to provide or would find too uneconomical to provide because of the limited number of children who would be involved in the program. The county becomes a way of achieving savings in the provision of educational services through economies of scale.

VI. Local Districts

A. School Board

The general powers of the local boards of education are set forth in several overlapping provisions.

§ 921

Every school district shall be under the control of a board of school trustees or a board of education.

§ 925

The governing board of each school district shall prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government.

§ 1001

The governing board of any school district may execute any powers delegated by law to it or to the district of which it is the governing board, and shall discharge any duty imposed by law upon it or upon the district of which it is the governing board.

§ 1052

The governing board of any school district shall prescribe rules not inconsistent with law or the rules prescribed by the State Board of Education, for the government and discipline of the schools under its jurisdiction.

The provisions just quoted make abundantly clear that the local districts are expected to work within the statutes, rules, and regulations to which they are subject. This is a point that need hardly have been reiterated so many times unless the point is to carry an implied message that local districts have little discretion.

While these provisions leave such an impression, when we turn to Section 7502 of the code the flavor of the relationship changes.

§ 7502

> The Legislature hereby recognizes that, because of the common needs and interests of the citizens of this state and the nation, there is a need to establish a common state curriculum for the public schools, but that, because of economic, geographic, physical, political and social diversity, there is a need for the development of educational programs at the local level, with the guidance of competent and experienced educators and citizens. Therefore, it is the intent of the Legislature to set broad minimum standards and guidelines for educational programs, and to encourage local districts to develop programs that will best fit the needs and interests of the pupils, pursuant to stated philosophy, goals, and objectives.

But when we turn to the provisions immediately following Section 7502 we find the more restrictive language again (Cal. Educ. Code, Sections 7503 and 7503.5):

§ 7503

> The governing board of any school district, including the governing board of any community college district, may initiate and carry on any educational program as defined in Section 7552 which is not in conflict with law and which is not in conflict with the purposes for which school districts are established.

§ 7503.5

> On or after January 1, 1976, the governing board of any school district, including the governing board of any community college district, may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

Any doubts we may have had about the overall tone of relationship between state and local agencies is, however, resolved when we turn to those many provisions of the code dealing specifically with the authority of the local districts over the control of their educational program. Once again the language strongly suggests state power and local compliance:

§ 8001

The governing board of every school district shall prepare and shall keep on file for public inspection the courses of study prescribed for the schools under its jurisdiction.

§ 8002

The governing board of every school district shall evaluate its educational program, and shall make such revisions as it deems necessary. Any revised educational program shall conform to the requirements of this division.

§ 8051

The governing board of every school district shall enforce in its schools the courses of study and the use of textbooks and other instructional materials prescribed and adopted by the proper authority.

§ 8054

The course of study for preschool, kindergarten, grades 1 through 6, and grades 7 and 8 of those elementary districts maintaining grades 7 and 8, shall be prescribed and enforced by the governing board. The governing board of any school district may cooperate with the county board of education and the county superintendent of schools in the development of the courses of study required by this section.

The development of any course of study by a school district governing board which involves the cooperation of the county board of education and the county superintendent of schools is a proper charge against whatever funds the county superintendent of schools may have for this purpose.

§ 8055

Except as provided in Section 8054, the course of study for grades 7 through 12 shall be prepared under the direction of the governing board having control thereof and shall be subject to approval as may be required by the state board.

§ 8502

In addition to the course of study requirements set forth in this chapter, the governing board of any school district may include in the curriculum of any school such additional courses of study, courses, subjects, or activities which it deems fit the needs of the pupils enrolled therein.

§ 8505

Any course of study adopted pursuant to this division shall be designed to fit the needs of the pupils for which the course of study is prescribed.

These general requirements must be read in connection with the mandatory curriculum requirements imposed by statute and outlined in Section II (3) above. Taking all the provisions together we can see that the primary duty of the local districts in California is to carry out the state mandated program which--as we have seen--is sufficiently extensive and broad that there is little room left in the day and year for many additions. The legislature has further imposed state control and supervision by the requirement in Section 8055 that the course of study in grades 7 through 12 shall be subject to approval as may be required by the state board. Following up on this provision the state board has provided that courses in grades 9-12 must be approved by the state and that courses will only be approved if the school district offers courses in math and reading stressing diagnosis and remedial instruction for students whose competence in these subjects is below the equivalent of 8th grade. This last requirement, however, can be waived for good cause upon written request. (Title 5 Cal. Ad. Code Section 10000.) Presumably the requirement that courses be cleared with the state board applies to courses added to the curriculum pursuant to Section 8502. There exists, then, at least the potential for rather complete state control over what goes in the school at the local level. This control is further increased to the extent the state boards adopt only the minimum number of books and materials allowed by law for a given subject in a given grade, thereby limiting the choices available to the local districts. (See discussion of textbook selection above in Section III.D.)

State control can be further assured through section 9300 pursuant to which the district board must make reports as required by the state superintendent concerning instructional materials used in its schools.

Grant, then, that the local district is confined to operating within the statutes and regulations of the legislature and state board respectively. What happens if there is a possible conflict between what the local district desires and what the state board--assuming for the moment that the local district appears to have been granted the authority to do what it is seeking to do. In other words, what is the California doctrine of preemption? How quickly will California courts find a conflict which the state must win, or how hard will courts work to avoid finding a conflict to give local agencies of government as much scope as possible?

First we might note the special situation with regard to certain municipalities in California. The California State Constitution provides that chartered cities may make and enforce all law and regulations with respect to municipal affairs, subject only to the restrictions and limitations provided in its charter. (Cal. Const. Article XI, Section 6; also see Article XI, Section 8) These provisions have been construed to mean that ordinances relating to matters which are purely municipal affairs are not invalid merely because they are in conflict with general state laws or because state laws have been enacted to cover the same subject. (Bishop v. City of San Jose, 1 Cal.3d 56, 81 Cal. Rptr. 465, 460 P.2s 137 (1969); Baron v. City of Los Angeles, 2 Cal.3d 535, 469 P.2d 353, 86 Cal. Rptr. 673 (1970).) Further it is the courts which are to determine which matters are purely municipal affairs and the mere fact that the legislature has decided to legislate in the area does not convert the area into one of state wide and not municipal concern. (Ibid.)

This kind of protection is not given to school districts since education so clearly is a matter of state concern--the state constitution makes this clear--and since school districts are not chartered cities given the protection of the special constitutional provisions noted above. Hence the doctrine which applies is formulated in terms of three tests applied to deterine whether a subject has been preempted by the legislature (and/or state board): (1) The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) The subject matter has been partially covered by general law couched in such terms as to indicate that a paramount state concern will not tolerate further or additional local action; or (3) The subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. (In Re Hubbard, 62 Cal.2d 119, 128, 41 Cal. Rptr. 393, 399, 396 P2d 809, 815 (1964).)

How restrictive of local authority are these tests? That is, have these tests in the hands of the courts led quickly to a finding of state preemption at the expense of local control? The evidence is not clear. For example, in one case despite the fact of finding on the books at least fifty state provisions dealing with firearms, the California Supreme Court concluded that the regulation of firearms was not a subject preempted by the state and San Francisco was free to establish an ordinance requiring registration of firearms. (Galvan v. Superior Court of City and County of San Francisco, 70 C.2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969.); also see Alta-Dena Dairy v. City of San Diego, 271 CA 2d 66, 76 Cal. Rptr. 510 (1969).)

In the case of In Re Cox, 3 C.3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) the question arose as to the validity of a local trespass ordinance that permitted the owner of a shopping center to remove two young men who did not conform in appearance to the rest of the crowd. The court found that despite existence of several state laws touching on questions of trespass, the area had not been preempted as the legislature expressly allowed for local regulation of conduct in places open to the public and this kind of local regulation had long been a subject left to local control.

In yet another case the issue arose as to whether the City of Los Angeles could pass an ordinance prohibiting fornication in certain locations listed in the ordinance. (Apparently the use of the automobile for such purposes was not prohibited as it was not mentioned among the seventeen other locations.) The court in reviewing the penal code's extensive list of provisions relating to sex-related crimes found no provision dealing with simple fornication absent cohabitation, but the court nevertheless concluded that the area had been preempted by the state and the ordinance was to be disallowed. (In Re Lane, 58 Cal.2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1962).)

If there is any pattern which emerges from the cases, it is that the courts are quicker to find state preemption in areas such as sex-related crimes which have traditionally been matters of state control and regulation and which touch upon fundamental values in our society, than in areas which are less sensitive culturally and where there is less need for a broadly based political decision which will have uniform application throughout the state. If this distinction is valid, it is not clear where this leaves us with regard to education. Certainly education has not only traditionally been a state concern, it has by the state constitution been made a state concern. Yet the state has in several provisions--Sections 925, 1001, 1052, 7502, 8002

and 8502 (all quoted above)--made it clear that to the extent local actions do not conflict with state law or regulations local districts have the authority to develop their educational program. It seems unlikely that these provisions are to be taken as mere empty shells without any meaning as they would have to be if the doctrine of preemption worked to oust local boards of any authority to act with regard to the educational program. Hence, presumably the legislature must have assumed the doctrine of preemption did not oust the local districts of all authority over the curriculum despite the extensive state regulation of the matter. Or perhaps these provisions are the state legislature's way of telling the courts that in this instance, despite the appearance created by the extensive legislation in the area of the school program, the legislature does not want this pattern of legislation to lead to the conclusion that there has been state preemption. This conclusion finds some support in Section 8055, which makes adoption of a course of study in grades 7 through 12 contingent upon state approval as may be required by the state board. (Cal. Educ. Code, Section 8055) In other words, this section is an indication that while the legislature has not wanted to preempt the field, nevertheless some state check on what is going at the local level is to be maintained. This pattern of constraint without total loss of control at the local level is also found in the state textbook selection law with its built-in limitations as to the minimum and maximum number of books to be selected by the state board. Local districts are not to be limited to the choice of less than five texts, yet they are not to have a wider range of choice than fifteen texts. Within that range the informal political forces working through the state board can determine more precisely the extent of state control over the local district.

We now turn to a problem closely related to the question of pre-emption--the issue of the restrictiveness versus the permissiveness of the statutory code. We saw that with regard to the state agencies the attorney general was unwilling to imply significant new powers from the statutory code, yet he was willing to imply a certain authority beyond what was expressly granted. But with local districts the approach of the courts and attorney general has not been quite so generous. The general rule appears to be that school boards have only such authority as is specifically granted by the legislature and this authority is to be exercised in the mode and within the limits permitted. (See Elder v. Anderson, 205 C.A.2d 326, 23 Cal. Rptr. 48, (1962); Hutton v. Pasadena City Schools, 261 C.A.2d 586, 68 Cal. Rptr. 103 (1968).)

An excellent example the network of constraints and the limitations on the local districts' authority in California is presented by the following question brought to the Attorney General: Does participation in marching band classes in high school satisfy the mandatory physical education requirements established by the California Education Code? (53 Cal. Ops. Atty. Gen. 230 (no. 70-20) (1970).) Districts raised the question because faced with a tight financial situation they wanted to save these programs by classifying them as physical education. To answer the question the opinion began by recounting the numerous statutes and regulations surrounding the provision of physical education in the public schools. Section 8573 requires that in order to graduate from high school students must take physical education, unless exempted pursuant to provisions of the code. Section 8571 requires that in grades 7 through 12, physical education be adopted with an emphasis given to such physical activities as may be conducive to health and to vigor of body and mind. Temporary exemptions under Section 8702 and 8703 could be granted for students who were ill or injured where a modified program to meet their

needs could be provided or to students who were engaged in school-sponsored interscholastic sports. Sections 461 and 463 of the code imposed upon the state board the duty to supervise and regulate physical education. And the state board regulations at the time of the opinion provided as follows (Title 5 Cal. Ad. Code Section 10060):

> "Each school district shall appraise the quality of the physical education program in each senior or four-year high school of the district by the following criteria:
>
> (a) The course of study provides for instruction in a developmental sequence in each of the following areas:
>
> (1) Effects of physical activity upon dynamic health.
>
> (2) Mechanics of body movement.
>
> (3) Aquatics.
>
> (4) Gymnastics and tumbling.
>
> (5) Individual and dual sports.
>
> (6) Rhythms and dance.
>
> (7) Team sports.
>
> (8) Combatives for boys.
>
> (b) Assignment of pupils to physical education courses is made on the basis of individual needs including such factors as health status, skill development, and/or grade level.
>
> (c) Instruction is provided for pupils with physical limitations including those with inadequate skill development and the physically underdeveloped. Physical performance tests as required by Section 1041 are used to identify physically underdeveloped pupils and to appraise the motor aspects of physical fitness.
>
> (d) Each course includes activities of a vigorous nature adapted to individual capacities, and designed to permit maximum development of each individual pupil.
>
> (e) Each class period includes the teaching of the fundamentals and techniques of each instructional area conducted during that period.
>
> (f) Class size is consistent with the requirements of good instruction and safety.

(g) Reporting of pupil achievement is based upon all of the following:

(1) Evaluation of the pupil's individual progress and the measure of his attainment of the goals specified in each area of instruction listed in subsection (a) of this section.

(2) Tests designed to determine skill and knowledge.

(3) Physical performance tests.

(4) Any other evaluation procedures required by local governing board regulations.

(h) Teaching stations are of sufficient number and suitability to provide instruction in activities conducted under subsection (a) of this section.

(i) Supplies and equipment of sufficient quantity and quality are provided to allow active participation of each pupil throughout the class period."

Section 8055 required state board approval of courses in grades 7 through 12, and state regulations required course approval for courses offered in grades 9 through 12.

Pursuant to all these provisions local districts had been coming to the department of education for permission to count band activities as physical education, but the department had consistently refused to approve these requests, even when the local districts had assigned a music teacher and physical education teacher to the classes. Upon being asked his opinion of the matter the attorney general wrote (p. 234):

> Despite the Department of Education's long standing administrative interpretation however, we believe that it may be possible to structure a physical education program to include marching band classes provided that the school district is able to show that the entire program substantially meets the objectives and criteria sought by the provisions of section 8571 and by section 10060, Title 5, Cal. Admin. Code. In addition, such a program would require the teacher to hold a physical education credential pursuant to section 13192, and must adequately prepare students for the physical performance testing required by the California School Testing Act of 1969. Education Code, ch. 9, sections 12820 et seq. Absent such a showing, we do not believe that marching band classes may be used to meet the statutory physical education requirements.

One can only guess that the attorney general must have written this passage in high good humor as it brings wonderful images to mind as one imagines a band class substantially complying with the regulation quoted above requiring aquatics, gymnastics and tumbling, and combatives for boys.

What all this reflects, then, is the kind of tangle in which local districts in California can find themselves. Despite general authority to devise programs which fit the needs of children, they must confront and work within many specific statutory and regulatory requirements. Another example of the limited authority of districts and the strict construction given to the authority of local districts is provided in yet another opinion of the attorney general. In this case the attorney general was asked if districts have the authority to provide free lunches to all pupils regardless of need. A relevant statutory provision provided that school districts could provide free breakfast and lunch, or either, for pupils who do not otherwise receive proper nourishment. The attorney general read the provision literally and found districts had been granted only limited authority to provide lunches to those who were needy. The strict language of the statute, and the assumption that only that authority which has been expressly granted has in fact been granted, both played a part in the conclusion reached. (40 Cal. Ops. Atty. Gen. 226 (1962).) In yet another case the question was raised whether local districts could offer courses such as automobile driver education, which are required for graduation, only in the summer or must they be available during the regular academic year. While the attorney general could find no specific prohibition in the statutes and regulations against such a practice, he did decide these provisions recognized a distinction between the summer and the regular academic year and that there was no explicit legislative authorization for such a practice. Hence he concluded the district did not have the authority. (43 Cal. Ops. Atty. Gen. 322 (1964).)

If the attorney general accurately reflects the legal climate, we can conclude that while courts might not be too quick to apply the preemption doctrine in education, they are likely not to be too generous in construing the scope of authority of the local districts. More than the other states studied, California has adopted a restrictive educational code. This point is underscored by the numerous specific authorizations on the books with regard to the educational program. It appears that absent those specific authorizations it cannot be assumed the local district has the authority to mount the course or program in question. In other words, general grants of authority in California appear not to be sufficient basis for finding local district authority to carry on its activities. We will illustrate these points in the next section.

(1) Selection of Courses and Programs

The basic course of study in the public schools has been outlined in statutory provisions set forth in Section 11, 3. There is an interesting distinction to be found in Section 8551 dealing with grades 1 through 6 and Section 8571 dealing with grades 7 through 12. Section 8551 requires instruction in certain subjects and areas beginning in grade 1 and continuing through grade 6. But Section 8571 talks in terms of offering courses in certain areas of study. Thus in the elementary grades, schools are required to offer instruction every year in the same areas and the instruction need not be packaged in terms of courses. The term course is defined in the code as an "instructional unit of an area or field of organized knowledge, usually provided on a semester, year, or prescribed length-of-time basis." (Cal. Educ. Code Section 7556) Whereas in grades 7 through 12 the areas of study listed in the statute need not be offered every year but are to be packaged in terms of courses. Thus it appears that with regard to the high school years there is local discretion

insofar as the statutes do not prescribe the precise program for each of the grades 7 through 12. This flexibility is in keeping with the absence of state selection of instructional materials for the high school years. But recall that this flexibility is held in check by the statutory and regulatory requirements that new courses in grades 9-12 must have prior approval of the state board. Apparently the most flexible area remains grades 7-9, where no prior approval is required. (Cal. Educ. Code Section 8055; Title 5 Cal. Ad. Code Section 10,000) Nevertheless, the constraints imposed on running of the junior and senior high schools are considerable, as the list of topics in Section 8571 is long. Besides, even the very content of the courses that must be offered has been sketched out in sections 8551 and 8571, especially with regard to social studies.

School districts are also required to ascertain the number of students of limited English-speaking ability and those who are without English speaking ability and the districts must provide each non-English-speaking child with special assistance. (More about this below.) (Cal. Educ. Code, Sections 5761.3 and 5761.4)

Local districts with more than 8,000 pupils are required to provide a course of study for mentally retarded students. Those districts with less than 8,000 pupils obtain services from the county board. (Cal. Educ. Code, Sections 8052, 8053) Similarly, educationally handicapped pupils must be offered services or, in lieu of services, tuition to attend a private school. The educationally handicapped are those of marked learning or behavior disorder, or both, who cannot benefit from the regular program. (Cal. Educ. Code, Sections 6750, 6751, 6770) Provision of programs for physically handicapped children appears not to be required of local districts.

Instruction in public health and safety, alcohol, narcotics and dangerous drugs is required by Sections 8503 and 8504.

Discretion is cut back further in physical and driver education courses by extensive state regulations. The kind of regulation in this area was indicated in the above discussion as to whether participation in marching band classes in high school would satisfy the mandatory physical education requirements established by the educational code. Similarly, extensive regulations affect driver education.

The appearance of a lack of basic and general discretionary authority is further reinforced by the presence on the books of numerous special provisions giving local districts specific permission to undertake this or that course or program of study. Such provisions would not be needed if the districts had a general grant of authority to control their school program.

The list of these grants of specific permission as culled from the Educational Code is lengthy. Specific permission is given to provide bilingual instruction above and beyond that required to be provided pursuant to Sections 5761.3 mentioned above (Cal. Educ. Code Section 71); permission has been granted to provide special classes for those not benefiting from the regular program (Cal. Educ. Code Section 5801); schools are authorized to provide vocational education classes on Saturday (Cal. Educ. Code Section 5901); authorization exists to provide aviation instruction, outdoor science instruction, and prevocational instruction (Cal. Educ. Code Section 6001, -011.1, 6032); programs for the mentally gifted may be offered (Cal. Educ. Code Section 6423); school districts may offer special programs and schools for the delinquent and near delinquent student (Cal. Educ. Code Section 6502, 6653, 6703); permission has been granted to provide a variety of special

education programs (Cal. Educ. Code Sections 6751, 6812.1, 6812.5, 6812.7, 6880.2); permission is available to offer sex education courses and courses on venereal diseases (Cal. Educ. Code, Sections 8506, 8506.1, 8507); and permission has been granted to provide instruction in bicycle safety (Cal. Educ. Code Section 8771). And of course permission has been granted to seek the various special grants that the state offers for promotion of certain courses of study, such as reading, and early childhood education (Cal. Educ. Code, Sections 5770, 6445).

Finally, we need to take note of Section 8502, which grants to the districts the authority to add such additional courses of study, courses, subjects or activities which it deems fit the needs of the pupils enrolled therein. With this provision the legislature seems to have attempted to avoid the problems that might arise under a restrictive code; local districts have the explicit authority to add to the curriculum above and beyond the mandatory requirements. But the question arises, if this provision is on the books, why was it necessary for the legislature specifically to authorize local districts to carry on those activities outlined in the previous paragraph? Further, any new courses added to the program in grades 7-12 are subject to the approval of the state board as may be required by the state board (Cal. Educ. Code, Section 8055). And as we have seen, the state board does require prior approval for courses to be offered in grades 9-12. (Title 5 Cal. Ad. Code, Section 10000)

In short, the legislature has left the code in a state of confusion. It has not made clear precisely what discretion local districts have in the formulation of their program. Many indications point to no discretion except as expressly authorized, whereas other provisions suggest freedom of choice above and beyond the minimum requirements. It might even be suggested that Section 8055 cuts two ways and creates more confusion. That is, by putting

Section 8055 on the books the legislature was saying local districts have authority to innovate with regard to the high school program, subject to the approval of the state board, but that as to the elementary school program, no such authority exists as there is no equivalent of Section 8055 for the elementary schools. Yet it might be said that 8055, when taken with Section 8502, implies that elementary schools may innovate without prior approval, but high schools must seek such approval.

Apart from what authority may or may not have been granted local districts, we still have the problem of abuse of discretion with regard to the exercise of that authority which local districts do in fact enjoy. Here we rely primarily on the discussion of this issue found in the study of New York. That study concluded that it is unlikely courts would get involved in the decision of school districts to offer or not to offer certain courses. We might only add here that presumably chances for court intervention would increase if it could be shown that somehow the failure to provide or the decision to provide a certain course of program touched a child's fundamental interest in education. In this regard the greatest chance for success would seem to be in connection with the failure to offer such programs as special assistance in English for children of limited English-speaking ability. Without the ability to speak English, these students would be substantially excluded from effective participation in the educational program in a way that their fundamental interest in education would be affected. Indeed failure to provide such assistance would seem to conflict with the goals of the educational system as set forth in Section 7503 with its stress upon giving students marketable skills and preparing them to enter the world of work. (Provision quoted in Section II, 3, above) Further, the schools in California are expected to offer courses suited to the needs of the students

(Cal. Educ. Code, Section 8505, quoted above) and the legislature itself has concluded that "the inability to speak, read and comprehend English presents a formidable obstacle to classroom learning and participation which can be removed only by instruction and training in the pupils' dominant language." (Cal. Educ. Code, Section 5761). (The theory of this last quoted provision seems to be that if the student learns his mother tongue he will be in a better position to learn English.)

Thus it appears that legislative policy would be violated by a failure to provide special assistance in English and we would have a clear case of abuse of discretion. One need not tackle the constitutional issues involved here to have a reasonable chance of success in compelling school districts to provide special assistance in English to those of limited English-speaking ability. (See Lau v. Nichols, 94 S. Ct. 786 (1974); Tyll van Geel, "The Right to be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans," 25 Syr. L. Rev. 863 (1974).)

It might also be noted that a similar line of argument might be developed with regard to other students who came to school with certain limitations, e.g., the physically handicapped. Failure to provide these students educational services to help prepare them to enter the world of work also would seem to affect a fundamental interest and constitute a violation of the state's educational policies. This last point is explicitly underscored by Section 7001, which provides in part: "The legislature finds and declares that all individuals with exceptional needs have a right to participate in appropriate programs of publicly supported education, and that the existing educational programs for these persons are in need of revision in order to assure them of this right to an appropriate educational opportunity."

Hence we might conclude once again that as a result of legislative activity the discretion of local districts to ignore these problems is limited--indeed it seems more limited than in any other state studied. Only in New York did we find a statement of legislative policy that was as explicit as that found in California. But California surpasses even New York in this respect.

(2) Selection of Methods and Materials

Just as it seems possible that suits might successfully be brought to force school districts to provide certain programs or courses, the possibility exists that suits might be brought to attack the method of instruction on the ground that it did not suit the needs of the pupils--did not promote learning. The many provisions quoted above, and especially Section 8505, which specifically requires that the course of study be designed to fit the needs of the pupils, seems to open the door to this kind of suit. This general concern with the adequacy of the programs is given extra impetus by the legislature through its establishment of such grant programs as the Miller-Unruh Basic Reading Act of 1965, which is designed to assure provision of those services which will prevent reading disabilities at the earliest possible time in the educational career of the pupil. (Cal. Educ. Code, Section 5771) In connection with early childhood education programs, the legislature has declared the purpose of such programs is to provide students with an individualized program to permit development of their maximum potential and to assure that all students who have completed the third grade will have achieved a level of competence in the basic skills to assure continued success in school. (Cal. Educ. Code, Section 6445.1)

State board regulations also stress the importance of the effectiveness of educational programs. Thus with regard to the education of educationally handicapped minors the regulations say the purpose of such programs

is the amelioration of handicapping conditions to the greatest extent possible and in the shortest time possible. (Title 5 Cal. Ad. Code, Section 3220(d).)

While it might be possible to get a court to listen to a complaint that a district abused its discretion by using methods of instruction that did not work, it seems that here we have a more difficult problem than if the district failed to provide any instruction whatsoever. For a court to start assessing the actual effectiveness of the program offered could easily lead into a quagmire of claims and counter-claims, all difficult to substantiate or disprove. Indeed, the selection of methods of instruction may be the quintessential example of what is committed to the expert judgment of the schools and thus free of judicial review. If this area is not largely left to the experts, there is little the courts would not get involved with. In any event, given the predilection of California courts not to intervene too quickly, we can assume that, on balance, getting judicial protection in this area is unlikely.

The scope of local district authority to select educational materials has already been discussed in Section III, D, above. As was noted there, districts may select their own materials for high schools, subject to certain substantive restraints prohibiting various forms of discrimination. School districts may not select their own materials for elementary schools, but are confined to choosing from the state list and to supplementing those materials with some non-approved materials. The non-approved materials may not be used in lieu of the state approved materials.

No cases were found involving challenges to textbooks or other materials.

(3) Constraints on Innovation. As had been made clear there are so many statutory and regulatory provisions controlling the educational program, we need to ask what the ways are available to school districts to get out from under the state's requirements. An important way out is found in Cal. Educ. Code Section 8058:

> § 8058. Course of study requirements; exemptions
>
> Upon request of the governing board of any school district, the State Board of Education may, for a number of years to be specified by the board, grant the district exemption from one or more of the course of study requirements set forth in this division. The exemption may be renewed. Such exemption may be granted only if the board deems that the request made is an essential part of a planned experimental curriculum project which the board determines will adequately fit the educational needs and interests of the pupils.
>
> The request for exemption shall include all of the following elements:
>
> (a) Rationale for the planned experimental curriculum project.
>
> (b) Objectives of the planned experimental curriculum project.
>
> (c) Plans for the administration and conduct of the planned experimental curriculum project, including the use of personnel, facilities, time, techniques, and activities.
>
> (d) Plans for testing and evaluation of the planned experimental project.
>
> (e) Plans for necessary revisions, if any, of the planned experimental curriculum project.
>
> (f) Plans for reporting to the State Board of Education on the planned experimental curriculum project.

This provision, coupled with Section 8055, discussed above, which deals with state board approval of courses of study in grades 7 through 12, opens the door to a readjustment of the educational program in a way that could violate the educational scheme adopted by the legislature. While no district unilaterally could make substantial changes in its offering, districts in conjunction with the state board could make such changes.

Another remarkable provision considering the restrictiveness of the code is found in Cal. Educ. Code Section 5801:

> The board of education of any city school district, upon the recommendation of the city superintendent of schools, or the board of school trustees of any elementary school district, upon recommendation of the county superintendent of schools, may establish and maintain separate classes for pupils who would profit more from a course other than the regular course of study prescribed for the elementary schools, and may substitute for the regular course of study other types of school work or study approved by the superintendent of schools as being better adapted to the mental needs of the pupils.

This provision opens the door to the segregation of pupils by "tracks" or ability groups. Even the text materials in these classes need not be state approved: Section 5802 says that these students need only use the state approved textbooks insofar as the textbooks are adapted to the work of the classes. Perhaps this section ought to be read in connection with Section 6032 of the code permitting districts to establish pre-vocational programs in grades 7, 8 and - for children who may drop out as indicated by their aptitude reflected on standardized tests. Similarly, authority to operate work-experience programs--programs under which students work part time at jobs--may be part of the pattern to be found in the code. (Cal. Educ. Code Sections 5985 et seq.)

Further, if section 8502 has any meaning and is not an empty shell as discussed above, school districts have authority to add courses above and beyond what is required by the educational cose. In this way, the curriculum can be made richer and more diverse.

Innovation can be introduced in a limited way by a school district taking advantage of provisions allowing for experimental programs for handicapped children and gifted pupils with the approval of the state board. (Cal. Educ. Code Sections 6802.15, 6812.5, 6904.3, 6947; Title 5 Cal. Ad. Code Section 3780.)

The grants discussed above provide another way of going about innovating in California. And the specific permissive authorizations discussed above also open the door to greater diversity in the educational program.

Section 1064 et seq. (Pocket Part) of the code gives local districts authority to contract with universities for the provision of laboratory schools in which new educational techniques may be tried out. And pursuant to Section 6401 boards may permit up to 15% of the 11th and 12th grade students to attend community colleges as part-time students. Section 6307 allows credit toward graduation for courses taken in junior college or state college. Section 8705 permits the granting of credit toward graduation for courses in foreign languages taken in private schools "on the basis of their being at least equivalent to those which would be required for the student in" the public schools. The state board of education has gone one step further by permitting the granting of credit toward graduation for courses taken in private schools on the condition the student can demonstrate by examinations his capabilities to the satisfaction of the public school. (Title 5 Cal. Ad. Code, Section 1631) Under similar restrictions credit for correspondence instruction may be obtained toward graduation. (Title 5 Cal. Ad. Code, Section 1633) Credit toward graduation can be obtained from training and classes taken while in the armed forces. (Cal. Educ. Code 6307; Title 5 Cal. Ad. Code, Section 1634) And as might be expected, based on what was said above, credit can be obtained for work experiences. (Cal. Educ. Code Section 5986; Title 5 Cal. Ad. Code, Section 1635.)

We find then that in a state with a restrictive educational code there still are numerous provisions on the books which allow for innovative and novel programs. The style of the California code is thus markedly different from that of other states which tend to grant local districts authority

in general terms thereby opening the door to innovation and variety. In California the legislature has restricted the local district but then opened the door again through other provisions. Which approach leads to more uniformity in the educational program and less innovation is an interesting question we cannot pursue here.

As we did with the other states, we now turn to a discussion of the extent to which the system for certifying teachers in the state imposes a constraint on educational innovation. As is the case in the other states studied, teachers must have a certificate to teach and school districts may hire only certified teachers. (Cal. Educ. Code, Section 13055, 13251) Emergency certificates can be issued pending completion of academic work toward a regular certificate. (Cal. Educ. Code, Section 13126) There are several types of regular certificates--those for a single subject, and multiple subjects; specialist certificates, e.g., reading, and what is called a designated subject, e.g., trade and technical subjects. Teachers can be assigned to any grade level but only with their consent and consistent with their certificate. (Cal. Educ. Code, Section 13129) As of June 30, 1975, certified teachers may with their consent be assigned to teach any single subject in which he or she has 18 semester hours of course work or to a multiple subject class if he or she holds at least 60 semester hours equally distributed among the four areas of a diversified major as set forth in Section 13157.4 of the Code. (Cal. Educ. Code, Section 13134) Another provision bars the assignment of a teacher with a special certificate to teach any subject not authorized in the certificate. (Cal. Educ. Code, Section 13283)

These basic certification requirements thus allow some flexibility in the assignment of teachers, if their consent is given, so as to permit changes in the existing program without having to go out and hire new teachers at a time when that might not be financially possible.

Innovation within the program is also made possible by other sections. An individual may be granted an "eminence certificate" to teach in the public schools if he or she has achieved eminence in a field of endeavor. (Cal. Educ. Code, Section 13133) Under this provision the school can hire for teaching in the schools people in the community who qualify under the state board's regulations. (Title 5 Cal. Ad. Code, Section 5924) Professionals and other experts in many fields might in this way be brought into the schools. And principals of schools when directed by local boards can employ special lecturers before classes and assemblies. (Cal. Educ. Code, Sections 13301 and 13302) Thus another way of incorporating the resources of the community into the school program is provided.

All in all, departures from the legislatively prescribed program are possible but generally such changes are under the control of the state board. School districts in California are never really free of state control.

(4) Assignment of Pupils to Courses and Programs. As we saw in Section II the legislature has created over a dozen categories of students. Associated with many of these categories are specific legislatively imposed procedural requirements dealing with the steps local districts must go through in order to classify a student. Before turning to these specific provisions it is worth noting that no general grant of authority has been given to school districts to group and classify pupils. Thus, assuming the code is a restrictive code, local districts apparently lack authority to establish general tracking systems, apart from the special authorizations to establish programs such as, for example, for the mentally retarded.

Each year school districts are expected to identify the children who are non-English speaking or of limited English speaking ability with a

view to providing at least the non-English speaking special services. (Cal. Educ. Code, Sections 5761.3 and 5761.4) In this area little in the way of statutory guidance is provided as to how this should be accomplished. The statute only provides definitions (Cal. Educ. Code, Section 5761.2):

> (b) "Children of limited-English-speaking ability" are defined as children who speak a language other than English in their home environment and who are less capable of performing school work in English than in their primary language.
>
> (c) A "non-English-speaking child" is a child who communicates in his or her home language only. Such child is unable to conduct basic conversations in English or take advantage from classroom instruction in English.
>
> (d) "Primary language" is a language other than English which is the language which the child first learned or the language which is spoken in the child's home environment.

Since these definitions leave much room for judgment it is up to the district to make the fine distinctions which may sometimes be called for. There are no provisions whereby a parent can challenge the exclusion of his child from the programs of special assistance in English, but parental permission is required for inclusion of the child in a special program. (Cal. Educ. Code, Section 5761)

For purposes of the various federal grants dealing with compensatory education, the legislature in California has provided its own definition of a "disadvantaged minor"... (Cal. Educ. Code, Section 6452):

> For purposes of this chapter, a "disadvantaged minor" is a minor who is potentially academically able but scholastically underachieving, and must compensate for inability to profit from the normal educational program. He is a minor who:
>
> (a) Is 3 years of age or more, but under 18 years of age and has not graduated from high school.
>
> (b) Is potentially capable of successfully completing a regular educational program leading to graduation from the elementary or secondary school in which he is enrolled or required to be enrolled.

> (c) Is, because of home and community environment, subject to such language, cultural, economic, and like disadvantages as will make improbable his completion of the regular program leading to graduation without special efforts on the part of school authorities, over, above, and, in addition to those involved in providing the regular educational programs, directed to the positive stimulation of his potential.

Again, however, no specific procedure is specified in the statute for classifying pupils as disadvantaged. The only limitation seems to be a warning in Section 6451 which says that "Nothing in this chapter shall be construed to sanction, perpetuate or promote the racial or ethnic segregation of pupils in the public schools."

As we shall see momentarily there exists a special category of disadvantaged minor. School districts it will be recalled may provide programs for mentally gifted minors. (Cal. Educ. Code, Section 6423) A mentally gifted minor as defined by the code is a student who is in the top 2 percent of all students. (Cal. Educ Code, Section 6421) State board regulations refine this definition by stipulating the kind of I.Q. and achievement tests to be used. (Title 5 Cal. Ad. Code, Section 3821) A special category of mentally gifted minor has also been provided for - "culturally disadvantaged underachieving pupils." The statutory definition of this student is that he or she is identified as having general intellectual capacity but for reasons associated with cultural disadvantages has underachieved scholastically . (Cal. Educ. Code, Section 6421(a)) While all other mentally gifted minors are to be identified by achievement in schools, by standardized tests and the judgements of school personnel, these methods are not to be the sole methods used for identifying the culturally disadvantaged minor. (Cal. Educ. Code, Section 6422) State regulations indicate the additional indices to be used. The judgment is also to be based on a prediction that within a reasonable time

and with appropriate curricular modifications the student will perform in school at a level equivalent to that of other mentally gifted minors. This prediction is to be made on the basis of the following evidence (Title 5 Cal. Ad. Code, Section 3822):

> (1) Precocious development and maturation in the preschool or primary period, or outstanding scholastic accomplishment at any point in his school career.
>
> (2) Unusual resourcefulness in coping with responsibilities, opportunities, deprivations, problems, frustrations, obstacles, lack of structure and direction, or overly structured settings.
>
> (3) Outstanding achievements, skills or creative products.
>
> (4) Scores at or above the 98th percentile on nonverbal (performance) scores of individual intelligence tests approved by the Superintendent of Public Instruction...

The local district superintendent has the ultimate responsibility of deciding which pupils will be eligible for the special program. He is to be assisted by a committee made up of the school principal, a school psychologist and others as may be designated. But before a student may participate in the program written consent of the parent or guardian must be on file with the district. (Title 5 Cal. Ad. Code, Sections 3820, 3831) There are no provisions whereby a parent can challenge the refusal of a district to label the child as mentally gifted. Nor are there any provisions touching upon the required racial and ethnic composition of the group determined to be mentally gifted.

One of the most sensitive tasks schools undertake in classifying pupils is determining which pupils may be labeled as mentally retarded. Because this is so sensitive an area, the California legislature has gone to extra lengths to spell out the criteria and procedures to be used in labeling children as retarded. The statute defines th[illegible]tally retarded pupil as all

pupils under 21 who because of retarded intellectual development as determined by individual psychological examination are incapable of being educated efficiently and profitably through ordinary classroom instruction. (Cal. Educ. Code, Section 6901) Certain children are automatically excluded from this category: those who score higher than two standard deviations below the norm on an individual I.Q. test. (Cal. Educ. Code, Section 6902.085) State regulations add to the list of the type of students that may not be placed in this category:

> 3441. The standards for individual evaluation set forth in Section 3401 shall be met. In addition, the affirmative recommendation of the local admission committee shall include a determination that the minor comes within the following criteria hereby required to be met.
>
> (a) General. The minor does not come within the provisions of Education Code Section 6902.
>
> (b) Physical Condition. The minor is:
>
> (1) Ambulatory to the extent and in such physical condition that no undue risk to himself or hazard to others is involved in his daily work and play activities;
>
> (2) Capable of being trained in toilet habits so he can develop control over his body functions.
>
> (c) Mental, Emotional, and Social Development. The minor is:
>
> (1) Able to communicate to the extent that he can make his wants known and to understand simple directions;
>
> (2) Developed socially to the extent that his behavior does not endanger himself and the physical well being of other members of the group;
>
> (3) Emotionally stable to the extent that group stimulation will not intensify his problems unduly, that he can react to learning and/or training situations, and that his presence is not inimical to the welfare of other children.

A further potentially important constraint on creating a group of mentally retarded students is found in the following, taken from Section 6902.06:

> The Legislature hereby finds and declares that there should not be disproportionate enrollment of any socioeconomic, minority, or ethnic group pupils in classes for the mentally retarded and that the verbal portion of the intelligence tests which are utilized by some schools for such placement tends to underestimate the academic ability of such pupils.

Perhaps enforcement of this provision may be possible through a writ of mandate. Constitutional attacks on disproportionate representation of the races in such classes is also possible. (David L. Kirp, "Schools as Sorters: The Constitutional and Policy Implications of Student Classification," 121 U. P. A. L. Rev. 705,759 (1973).)

Beyond these negative prescriptions the statutes and regulations require that certain affirmative steps be taken before a child may be labeled as mentally retarded. The child must be given a verbal or nonverbal intelligence test in the primary home language in which the child is most fluent. The tests must be approved by the state board. (Cal. Educ. Code, Section 6902.07) The regulations further add that a child may not be classified as mentally retarded if he scores on a nonverbal portion of a test with verbal and non-verbal portions, higher than the maximum score used as a ceiling by the school district in determining mental retardation. (Title 5 Cal. Ad. Code, Section 3401(a).) The child must also be given a complete psychological exam by a school psychologist which is to include estimates of adaptive behavior. This interview is to be in the language of the child's home, or with an interpreter present. Apparently this individual psychological exam cannot be given without permission of the parent and since a student cannot be classified as retarded without the exam the parent can in effect stop of the classification process at this point.

The information collected through the tests and examination plus other background information then goes to an admission committee to be made

up of an administrator, special education teacher, school nurse, and school psychologist who examined the child. (Cal. Educ. Code, Section 6902.05) The child's parent can be represented by a physician, optometrist, psychologist, social worker or teacher and may present additional materials to the committee. (Cal. Educ. Code, Section 6902.055) The recommendation of the committee for placement is to be accompanied by a statement that in the professional judgment of the committee the child can reasonably be expected to benefit from such placement. (Cal. Educ. Code, Section 6902.05) It should be noted here that Section 6902.095 allows for, in exceptional circumstances, for an admission committee to recommend placement in a special education class of a child despite having scored higher than two standard deviations below the norm. But this must be by unanimous agreement. (Cal. Educ. Code, Section 6902.095) But no pupil snall be placed in a special education class without written consent of parent or guardian, which can be obtained only after a full explanation is provided. (Cal. Educ. Code, Section 6902.085)

"Educationally handicapped" pupils constitute another class of pupils. These are children "of marked learning or behavior disorders, or both," who as a result require special education programs. These disorders are to be associated with a neurological handicap or emotional disturbance and shall not be attributed to mental retardation. (Cal. Educ. Code, Section 6750) State Board regulations greatly expand upon this definition. (Title 5 Cal. Ad. Code, Section 3230) The procedures to be followed basically parallel those to be followed in classifying pupils as mentally retarded. (Cal. Educ. Code, Section 6755) Once again the parent can be represernted before the admissions committee and must given written consent to have the child placed in the special program for this sort of student. (Cal. Educ. Code, Section 6755.2, 6755.3)

As for classifying pupils as habitually truant, in danger of becoming habitually truant, in danger of becoming irregular in attendance, insubordinate, or disorderly, for purposes of assigning them to "opportunity" schools, classes or programs, this task has been left to the city superintendent or board without any procedural regulations to get in the way.

Assigning pupils to a 24 hour elementary school is hedged with more procedural requirements. There is an admission and discharge committee which consists of a teacher, psychologist, nurse, social worker, principal, attendance supervisor, licensed physician, probation department representative and social welfare department representative. The criteria to be followed are whether the parents did not exercise proper care, supervision or guidance, or whether by reason of insubordinate conduct or refusal to obey school rules the child is in need of special training, and discipline to prevent him or her from becoming subject to the provisions of the law. (Cal. Educ. Code, Sections 6706, 6708) A student can be assigned to such a school by the superintendent of the district with consent of parents or by court order.

Then there is section 5801 quoted above which permits districts to establish a separate course of study for students "who would profit more from a course other than the regular course of study prescribed for the elementary schools..." No other criteria or procedures are spelled out apparently leaving the schools a free hand to push students out of regular classes if they so wish.

Another classification that may be used by the schools is that of pupils who have learning handicaps or behavioral disorders, associated with learning handicaps which have been identified and for whom specific educational objectives have been formulated. The definition of these pupils continues as follows (Cal. Educ. Code, Section 36300 Pocket Part):

> Such pupils shall have been enrolled or be eligible for enrollment in existing special education provisions of this code, except that pupils eligible for Miller-Unruch basic reading programs and compensatory education programs may be included whenever such pupils and funds are combined in an overall supplementary education plan.

Thus it appears at first that this classification adds nothing to the classifications already discussed. It is merely a way of lumping together pupils who had been classified under other provisions of the code. Yet in a separate provision special mention is made of a separate admissions committee which is to be used in classifying pupils for purposes of this special program. And it is said that pupils that fall into this program shall remain in the regular classroom for at least one-half the day -- a requirement that does not apply, for example, to the mentally retarded. (Cal. Educ. Code, Section 36200 Pocket Part) Hence it appears after all that these provisions establish yet another classification of pupils, albeit not very clearly defined.

While local districts have no general authority to classify pupils they do seem to have been granted many opportunities to establish a variety of special programs which when all taken together allow for the possibility of a general tracking or ability grouping system. Most evident is the authority to establish programs for children who are not doing too well in school and programs for children who are exceptionally bright. What is missing is specific authority to differentiate among those children that do not tend to fall into these academic or behavioral extremes. It is interesting to note that one section of the code suggests that schools may in fact have the authority to create such distinctions within the program. Section 7471 bars any indication on the graduation diploma that a student was classified based upon intelligence or mental capacity. However, the

section explicitly does not bar an indication that the student made high grades or completed his course with honors. Thus the implication may be found that districts do in fact classify their students not just in terms of mental retardation versus mental giftedness. But this is not a necessary implication from the section.

Finally we note Section 91 of the Code:

§ 91. Prohibited sex discrimination

(a) It is the policy of the state that elementary and secondary school and community college classes and courses, including non-academic and elective classes and courses be conducted, without regard to the sex of the pupils enrolled in such classes and courses.

(b) No school district shall prohibit any pupil from enrolling in any class or course on the basis of the sex of the pupil, except a class subject to Section 8506.

(c) No school district shall require pupils of one sex to enroll in a particular class or course, unless the same class or course is also required of pupils of the opposite sex.

(d) No school counselor shall, on the basis of the sex of a pupil, offer vocational or school program guidance to pupils of one sex which is different from that offered to pupils of the opposite sex or, in counseling students, differentiate career, vocational or higher education opportunities on the basis of the sex of the pupil counseled.

(e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.

The reference in sub-part (b) to section 8506 of the code is a reference to a provision permitted school districts to offer a sex education course.

The California legislature has been more careful with regard to the problem of the classification of pupils than the legislatures of other states.

Because of the concern on the part of the legislature with the

correctness of any classification of an individual pupil and because the highest state court has deemed education to be a fundamental interest, we might reasonably expect the courts to review especially those classification decisions in which the parent had no say whatsoever. For example, Section 5801 allows for considerably abuse of power and a decision pursuant to this section to pull a child out of the regular course of study would seem likely to be subject to judicial review in California. There is then in California at least at this time a potential further check upon the discretion of local districts.

(5) Neutrality and Political Indoctrination. California is like the other states studied in that a daily pledge to the flag is required in the schools as part of the usual school effort to promote attachment to the nation. (Cal. Educ. Code, Section 5211). The state board regulations provide (Title 5 Cal. Ad. Code, Section 21):

> The governing board of each school district shall require, and provide for, the giving of appropriate instruction throughout the school term and the holding of appropriate exercises or other activities in each school under its jurisdiction during the last week of the annual school term of the school which shall emphasize to the pupils of the school the meaning of the Flag of the United States and the purpose, ideals, and freedoms for which it stands. There shall be a daily pledge of allegiance to the Flag of the United States in each public school, conducted in accordance with regulations which shall be adopted by each governing board.

As for the basic course of study the statutory provisions require the districts to provide instruction continuously through grades 1 through 6 in various kinds of political education. "Instruction shall provide a foundation for understanding the history, resources, development, and government of California and the United States of America; the development of the American economic system including the role of the entrepreneur and labor:...and contemporary issues." (Cal. Educ. Code, Section 8551 (c).)

The contribution of various ethnic groups and women to the economic, political and social development of California and the U.S. is to be studied with particular emphasis on portraying the roles of these groups in contemporary society. (Cal. Educ. Code, Section 8553) Similar requirements are imposed upon the schools for grades 7 through 12 with the addition that students obtain instruction in the American legal system, the operation of the juvenile and adult criminal justice systems, and the rights and duties of citizens under the criminal and civil law and the State and Federal Constitutions. (Cal. Educ. Code, Section 8571(b)) No student is allowed to graduate without a course both in American history and American government. (Cal. Educ. Code, Section 8573) And section 9031 provides:

> No teacher giving instruction in any school, or on any property belonging to any agencies included in the public school system, shall advocate or teach communism with the intent to indoctrinate or to inculcate in the mind of any pupil a preference for communism.
>
> In prohibiting the advocacy or teaching of communism with the intent of indoctrinating or inculcating a preference in the mind of any pupil for such doctrine, the Legislature does not intend to prevent the teaching of the facts about communism. Rather, the Legislature intends to prevent the advocacy of, or inculcation and indoctrination into, communism as is hereinafter defined, for the purpose of undermining patriotism for, and the belief in, the government of the United States and of this state.
>
> For purposes of this section, communism is a political theory that the presently existing form of government of the United States or of this state should be changed, by force, violence, or other unconstitutional means, to a totalitarian dictatorship which is based on the principles of communism as expounded by Marx, Lenin, and Stalin.

Supplementing the basic educational program are required celebrations of certain people and anniversaries. February 15th is Susan B. Anthony Day on which with suitable exercises attention is to be directed to the development of the political and economic status of women in the U.S. March 5th is set

aside to honor Crispus Attucks, the first black American martyr of the Boston Massacre; on this day called "Black American Day" attention is directed to the development of black people in the U.S. Schools are required to hold commorative exercises on or near the birth dates of Washington and Lincoln. (Cal. Educ. Code, Sections 5206, 5206.1, 5203) And section 5204 provides:

> All public schools and educational institutions shall include in the school work on or near the anniversary of the adoption of the Constitution of the United States exercises and instruction for pupils suitable to their ages in the purpose, meaning, and importance of the Constitution of the United States, including the Bill of Rights.

What is of note about these provisions is that while there is much here which is similar to what was found in the other states, the overall tone is markedly different. Here for the first time we find a stress upon the Bill of Rights and the civil liberties of Americans. None of the other states studied placed any emphasis upon this in their statutory provisions. Second, the emphasis in these provisions upon recognizing the political economic and social status and contributions of people other than the white male is also of great significance. No other state studied had such requirements in its code. Third, California in sharp contrast to Florida and Arizona does not insist that the "evils" of Communism be reviewed in the class. In fact the legislature specifically permits instruction with regard to the "facts" of communism. Fourth, the code also specifically requires schools to provide instruction in contemporary issues. What this requirement means in practice is hard to say but if this is coupled with the requirement that the materials reflect accurately the role of various ethnic groups in society, we have ample basis for concluding the code does not expect the

pressing social and economic issues facing the society to be glossed over. In short, the overall tone of the California code is markedly different from that found in any other state. Here for the only time we encounter a code which does not simply stress programs designed to develop uncritical attachment to the nation. Here for the only time do we find a stress on individual rights rather than just loyality to the nation. Here for the first time communism can enter the school as a legitimate subject for study. Whether in fact the spirit of these provisions prevails at the local district level is a separate empirical question.

(6) Acculturation. California more than the other states studied places stress upon a recognition of the diversity of the population of the United States. The statutory provisions discussed immediately above with regard to the political role and contribution of various ethnic groups brings this out. Similarly Sections 9002, 9240, and 9243 quoted in connection with the selection of textbook materials requires that these materials reflect the ethnic diversity of California and the U.S. And when it comes to bilingual instruction the legislature wrote (Cal. Educ. Code, Section 5761):

> The primary goals of such programs shall be to develop competence in two languages for all participating pupils, to provide positive reinforcement of the self-image of participating children, and to develop intergroup and intercultural awareness among pupils, parents, and the staff in participating school districts.

If there is anything surprising about this sentence and the whole of the bilingual educational provisions it is the way in which biculturalism has been played down. In fact, the sentence just quoted is the only provision directed to biculturalism in the act. Overall the stress in the act seems to be on bilingualism alone. Whether the absence of an explicit grant of authority

to make such programs also bicultural and whether the doctrine of preemption would bar such an attempt raises an interesting question.

One approach to the problem would go as follows. This is a restrictive code and local districts only have that authority which has been granted to them. There is no specific authorization to offer a bicultural education, hence the district lacks the authority. Even those statutes requiring discussion of the contribution of women and certain minority groups to development of the country do not authorize bicultural education. But even if those statutes were read to offer such a program of instruction, the more specific bilingual statutes can be read to overrule those statutes, to in effect withdraw that implied authority, hence, once again we conclude there is a lack of authority.

The alternative approach would be to say the authorization to offer bilingualism must be read to include the power to offer a bicultural program as bilingualism cannot effectively be offered without offering a bicultural program. The legislature must have been implying both, must have included the one in the other. This is reinforced by the statutes stressing the importance of showing the contribution of women and minority groups to the development of the country.

Section 91 quoted in the section above dealing with pupil classification serves as another barrier to some forms of acculturation, namely, those which rest upon a requirement that, for example, girls take home economics and boys take shop. Educational requirements based upon the sex of the student are no longer permitted. Similarly exclusion from courses on the basis of sex is now prohibited.

With this general outline of California policy in mind we turn to a

discussion of three problems (i) Parents seeking to challenge the school's acculturation policy so as to force the school to be neutral; (ii) Parents seeking exemptions for their own children from specific courses; (iii) the adoption of ethnic study programs in which students may voluntarily enroll.

(i) We are concerned here with non-constitutional challenges to the schools' acculturation policies on the ground that they take sides on the question of culture. A superficial examination of the provisions involved, Sections 8553, 8576, 9002, 9240, 9243, suggests that these provisions should in no way prevent school districts, for example, from following a course of study which emphasizes the white culture so long as the role and contribution of other ethnic groups is taken up and so long as the course of study does not adversely reflect upon persons because of their race, color, creed, national origin, ancestry, sex or occupation. The authority of schools in California deliberately to acculturate is underscored by Section 71 of the Education Code:

> English shall be the basic language of instruction in all schools.
>
> The governing board of any school district and any private school may determine when and under what circumstances instruction may be given bilingually.
>
> It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that bilingual instruction may be offered in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is authorized to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.
>
> Pupils who are proficient in English and who, by successful completion of advanced courses in a foreign language or by other means, have become fluent in that language may be instructed in classes conducted in that foreign language.

If we can reasonably assume that language is at the heart of a culture, the policy of California is to stress acculturation in the English-speaking culture. It would seem from this section that bilingual instruction is largely to be provided to encourage ultimate language transfer. That is, the theory appears to be that once the child has learned his own mother tongue well, he will better be able to learn English. Thus the code seems to encourage acculturation in the dominant English-language culture and the negative limitations do not at first seem to get in the way.

However we should not underestimate the potential difficulties these provisions can cause. It could be argued that the requirement of an accurate portrayal of the contribution of ethnic groups to the society might require an introduction to white racism as an important part of what this ethnic group has done for America. Yet the preclusion of any adverse reflection on persons because of their race would seem to bar such a discussion. Hence we find that Sections 9240 and 9243 can be in conflict with each other. Similarly if one were accurately to portray the contribution of both men and women, the inevitable result would be a greater stress upon what men have done since there are in fact more historical figures of importance who are men rather than women. But does this fact then require further probing into the problems of the subjugation of women in society? If this were done, would this then in turn adversely reflect upon certain people, males, because of their sex? And what about the requirement that the basic curriculum include instruction in "contemporary issues"?

The tangle these issues raise is quite obvious. It becomes extremely difficult to determine what in fact these provisions permit or require, or make feasible or infeasible. For example, whether it is possible accurately to portray a given culture and at the same time get people to accept that

culture is an interesting question: presumably the schools would somehow have to convince students that despite the warts the culture should be embraced.

This kind of statutory confusion is just the sort of thing that invites a judicial response yet this is an area in which it is so difficult to formulate standards and principles that courts would not be inclined to get involved. For example, how might a court interpret the requirement that schools accurately portray the role and contribution of ethnic groups: When is a portrayal accurate or inaccurate? And what if truth and adverse reflection conflict: which is to have priority under this statutory scheme? Or can truth never amount to adverse reflection? Because the problems are so difficult it seems unlikely any court would quickly get involved.

(11) The case of Hardwick v. Board of School Trustees, 205 P. 49 (1921) is one of the few cases that deals with the problem of the right of a parent to seek to exempt his child from a particular course required of the child by the public schools. In that case the parent sought a writ of mandate to have his child reinstated in school after the school district expelled the student upon the refusal of the parent to let the child participate in a course in which dancing was taught. The parent said the dancing lessons were offensive to his "conscientious scruples and contrary to the religious beliefs and principles" of his children. The school's demurrer was upheld by the trial court but overturned on appeal. The court of appeal treated the case not as "not necessarily one of religion." It was as much a question of morals, said the court, and liberty of conscience, as well as the right of parents to control the upbringing of their own children. These rights the court characterized as natural and constitutional without specific reference

to any constitutional provision of either the state or U.S. constitutions. The court also noted that the views of the parents were assumed in this case to be reasonable and related to matters on which parents should be heard first.

Then without saying so expressly the court proceeded with its analysis on the assumption that there might be a justification for state coercion of the child if it could be shown that granting the exemption would undermine discipline. The court found that no such problem would be created in this case. Further the court found there were alternative ways in which the school could go about encouraging bodily vigor. Hence it was concluded that the exemption must be granted.

In dictum the court said the case was markedly different from someone seeking an exemption from the required salute to the flag. The overriding interest of the government and schools to promote loyality to the country precluded any successful request for an exemption from this requirement.

Thus there does exist in California one old and apparently constitutional decision requiring schools to grant exemptions to children who object to certain subjects or courses. Perhaps a non-constitutional challenge might also succeed today in California in light of the legislature's support of parental choice on so many matters in the school program: it will be recalled from the prior discussion that parents have the right to keep their children out of bilingual instruction, instruction for the mentally gifted, and certain other special education programs. Parents are also given the option of keeping their children out of sex education classes and out of classes dealing with venereal disease. (Cal. Educ. Code, Sections 8506, 8507)

Children must also be excused from health instruction and instruction in family life if it conflicts with religious and/or moral beliefs. (Cal. Educ. Code, Section 8701)

With this kind of legislative policy in the background parents might have a basis for claiming an abuse of discretion if schools fail to grant an exemption from courses or even portions of courses that are in conflict with parental beliefs. Of course it is not likely the courts will be rash in granting such exemptions as other interests have to be taken into account: school discipline, and the interests of the child. Further, as we noted in the study of New York, the more choice is given to parents, the greater the chance parents may use their discretion to make discriminatory choices, e.g., choices which involve the parents in avoiding courses because of racial or other prejudices.

(iii) Ethnic Study Programs. Apparently California law presents no bar to the establishment of special programs which emphasize the study of a single culture, e.g., Spanish or Black culture, in which students may voluntarily enroll even if the result is that only Spanish or black students enter the given program. The establishment of such programs took place in Berkeley, California and the main legal difficulties the programs encountered were not with the state but with the Civil Rights Act of 1964. These programs are now dissolved for administrative and financial reasons without there ever having been a definitive resolution of the issues arising under theCivil Rights Act or the U. S. Constitution. (See "Comments: Alternative Schools for Minority Students: The Constitution, the Civil Rights Act and the Berkeley Experiment," 61 Cal. L. Rev. 858 (1973).)

In Section A of Part VI we assessed the scope of local district authority in terms of the extent of state control over the local district. We now turn to the extent to which other participants at the local level may have control over the curriculum too. In some instances this control derives from the local board and in other instances control, to the extent it exists, serves as yet another check on the scope of local board discretion.

* * * * * * * *

B. Superintendent and Principals

Local superintendents have been given by statute no specific duties or responsibilities with regard to the curriculum. (Cal. Educ. Code, Section 939) And no cases were found dealing with the possibility of the superintendent having standing in the courts to challenge the educational policy of the board. Hence there was no basis found to conclude that the power of the superintendent may serve as a check on the authority of the local district. That is, there is no indication that control of the curriculum is in any sense a jointly-shared authority.

Of course nothing precludes the board from delegating authority to the superintendent with regard to the curriculum. In fact section 7 of the Educational Code gives boards the authority to delegate powers. (Cal. Educ. Codes, Sections 7, 931; also Ops. Atty. Gen. 72 (1967).)

Similarly, principals have been given by statute no right to control the curriculum but principals do have a duty to make certain reports when directed by city or district superintendents. (Cal. Educ. Code, Sections 13563-13564) High school principals in particular have the duty under Section 13567 annually to report to the state superintendent under oath with regard to the textbooks then in use in the high school, the courses of study

offered, the requirements for graduation and such other information as may be required.

C. The Teacher

The statutory code gives the individual teacher no rights with regard to controlling the school program but instead many duties. Section 13556 requires every teacher to enforce the course of study, use the legally authorized textbooks and enforce the rules and regulations prescribed for schools. Failure to comply can be the basis for dismissal and the loss of a certificate. (Cal. Educ. Code, Sections 13204, 13404, 13443 (d).) And Section 9011 bars the use of supplementary materials in the class if disapproved by the school board.

But the obligations of the teacher do not end with this. Section 13556.5 provides:

> Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, including kindness toward domestic pets and the humane treatment of living creatures, to teach them to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and the principles of a free government.

This provision might be read in connection with Sections 12951-12953 which prohibit employees in a school district from knowingly being members of the Communist party. And Section 13165 requires an oath pledging support of the Constitution. Section 9031 quoted above bars teachers from advocating or teaching Communism with the intent to indoctrinate or to inculcate in the mind of any pupil a preference for Communism. However, the teaching of facts about Communism is not prohibited. Teachers are also specifically enjoined from giving instruction which reflects adversely upon persons because of their race, sex, color, creed, national origin or ancestry. (Cal. Educ. Code, Section 9001)

The only provision in the code suggesting that the individual teacher may have some rights with regard to the control of the curriculum is Section 9462, which requires that boards shall provide for substantial teacher involvement in selecting instructional materials.

These provisions reveal the kind of limitations on teachers in the public schools. We can go one step further by taking note of Section 13443(d) which provides that probationary teachers may be refused reemployment for cause only, but the cause shall relate solely to the welfare of the schools and the pupils. This provision would seem substantially to reduce teacher control of curriculum within the class since it is unlikely that when a board refuses to rehire a teacher because of what he or she taught in the classroom, any court would conclude this did not relate to the welfare of the pupils. Strangely enough this is exactly what happened in Lindros v. Governing Board, 9 Cal. 3d 524, 510 P.2d 361, 108 Cal. Rptr. 185 (1973). In that case a teacher read to his English composition class his own short story which closed with the words, "White-mother-fuckin-Pig." For reading the story with these words the teacher was dismissed and the court viewed the question as whether the cause was related to the welfare of the pupils. The court found that the use of the words was not related to the welfare of the pupils, hence not a basis for dismissal. The conclusion was reached after the court noted the teacher's conduct, the absense of any school rule on the subject, the use of such words in materials found inside and outside the class, the nature of the creative writing class, the absence of complaints, and the teacher's willingness to cooperate when asked not to do what he had done. The dissent in the case said the majority opinion had emasculated the provisions of Section 1343. And it does seem hard to that the local district's decision was not based upon the welfare

pupils. Presumably what really is at stake here are two factors not clearly brought out: (i) differing conceptions of the welfare of the pupils, i.e., the court simply decided that the local district had abused its power by misinterpreting the welfare of the pupils; and (ii) the never raised constitutional rights of the teacher to academic freedom. In any event, the point is that it took a rather clever mode of reasoning to avoid the natural import of the statute which would tend to restrict the freedom of teachers to introduce their own materials into the classroom. ("Comments: The Scope of Judicial Review of Probationary Teacher Dismissal in California: Critique and Proposal," 21 UCLA L. Rev. 1257 (1974).)

In the past other teachers have not been so lucky in the courts. Thus in one case a teacher advocated that one candidate for elected office be voted for rather than another. The court concluded that even absent statutory authority to dismiss teachers for partisan comments, it could fire the teacher. (Goldsmith v. Board of Education, 66 Cal. App. 157 (1924).) But in Adock v. Board of Education of San Diego Unified School District, 10 Cal.3d 60, 513 P.2d 900, 109 Cal. Rept. 676 (1973) the teacher avoided transferral from his school despite open criticism at officially sponsored "Open Forums" of the dress codes and the refusal of the administration to publish a second student newspaper. It was found he had not dealt with these issues in class; had not undermined authority in the school and had merely taken an officially sponsored opportunity to speak out. And finally we might note the cases have gone both ways on whether schools can force teachers to shave off their beards. (Akin v. Board of Education of Riverside Unified School District, 262 CA 161, 68 Cal. Rptr. 557 (1968) cert. den. 383 U.S. 1041 (1968), (upholding power of school); cf. Finot v. Pasadena City Board of Education, 58 Cal. Rptr. 520 (1967).

These cases hardly represent a major recognition of academic freedom on the part of teachers substantially to control the curriculum in the schools. At most we find that teachers may interject a personal note into the classroom (a short story, a beard) without having to answer for it with their jobs or by suffering a transfer out of the school. Hence, we conclude that teachers do not in California, have any significant role as a matter of law in the formation of school curriculum policy.

D. Unions

In California we find one of the more unusual statutes regarding collective negotiations. Section 13085 provides in part:

> A public school employer . . . shall meet and confer with representatives of employee organizations representing certified employees upon request with regard to procedures relating to the definition of educational objectives, the determination of the content of courses and curricula, the selection of textbooks, and other aspects of the instructional program to the extent such matters are within the discretion of the public school employer or governing board under the law.

Several points about this provision are important to note. First, the meet and confer process itself may very well turn into a process which looks like "negotiations" but the result of the process may not be a contract that binds the district on educational policy. One lower court has said that the school board does not have authority to enter a binding agreement on educational policy matters. (Hayes v. Association of Classroom Teachers, 76 L.R.R.M. 2140, 2144 (1970) quoted in "Comments, Teacher Collective Bargaining -- Who Runs the Schools?" 2 Fordham Urban L. J. 505, 510 (1974).) And a California Court of Appeals has said that agreements under this act must be subject to change at the board's pleasure. (Grasko v. Los Angeles, 31 Ca. App. 3d 290, 107 Cal. Rptr. 334 (Ct. App. 2d Dist. 1973).)

Yet it is important that here, unlike the other states studied, the union is given the right to demand that curriculum policy be placed on the table. The statute limits the discussion to "procedures relating to" curriculum policy, the distinction apparently being one of discussion of the policy itself versus how the policy is to be formulated. Again, whether this is a meaningful distinction in practice is hard to say. One study concluded that as a practical matter what occurred in California under this provision and what occurred in New York under the Taylor Act were almost identical. That is, the same issues and the same agreements were reached in both states notwithstanding the differences in statutory language. Of course the big difference between the two states is that in New York curriculum policy is not a mandatory subject of negotiations. ("Comments, Teacher Collective Bargaining -- Who Runs the Schools?" 2 Fordham Urban L. J. 505, 558-559 (1974).

E. Parents

More than in other states, parents have been given statutory rights to get involved in their child's education. The rights given to parents are quite varied. We have already seen the extent to which parents can become involved in the classification of their children, e.g., they may be represented at meetings of officials called to classify their child as mentally retarded. Secondly, parents as we have seen have the right to bar the placement of their child in a given program or course. Thus, parents may stop the placement of their child in a sex education course or in a bilingual program. We also outlined an early California case in which a parent successfully resisted the school's requirement that his children take dancing lessons. And there are yet other special educational programs of a more experimental nature that parents have been given rights with regard to--

right of non-participation, right to challenge the assessments, right to present information. (Cal. Educ. Code, Sections 7000 et seq., 7022, 7022.1, 7022.2) Indeed, Section 10521 states in general terms that no pupil may be required to participate in any special class or program unless the parent is first apprised of the facts which make participation in the special program necessary or desirable.

In addition to the rights of parents with regard to the special placement of their pupils, parents also have a right of access to all written records relating to their child. "No written material concerning his child or ward shall be edited or withheld, and the parent or guardian shall be entitled to read such material personally." (Cal. Educ. Code, Section 10751, 10757) There are two rather extensive provisions dealing with the right of parents to obtain the removal of information in the written records of his child. (Cal. Educ. Code, Sections 10760, 10761) Since the written record of a child can so greatly influence his placement and treatment in schools, these rights of the parents can have an important bearing upon the kind of educational program to which the child is exposed.

Separate provisions deal with the right of parents with regard to the administration of a mental exam and mental treatment. (Cal. Educ. Code, Sections 11801-11804; 58 Ops. Atty. Gen. 65 (1975).)

Parents can also seek to have their children excused from school in order to participate in religious exercises or to receive moral and religious instruction. (Cal. Educ. Code, Section 1086) This provision in short requires schools to allow for released time if desired by a parent.

Beyond the chance of influencing the choice as to which kind of educational program his own child may be exposed to, parents have a few limited statutory rights to influence the overall direction of the educational

program in the schools. Section 9462 requires that district boards promote the involvement of parents and other members of the community in selecting instructional materials. Additionally several of the special programs that involve grants call for parent involvement in a variety of ways. Bilingual programs must establish a district-wide parent advisory committee in which parents of participating students shall constitute more than a simple majority. (Cal. Educ. Code 5763) Parents are given an even more extensive role in early childhood education programs for children roughly between the ages of 3 years and nine months to completion of 3rd grade. (Cal. Educ. Code, Section 6445.01):

> As used in this chapter, "parent participation" means the parents taking an active part in the initial planning of early childhood education programs and the implementation, evaluation, and modification of the programs.
>
> Parent participation shall be included in a manner which:
>
> (a) Involves parents in the formal education of their children directly in the classroom and through the decisionmaking process of the California public school system.
>
> (b) Maximizes the opportunity for teachers and parents to cooperatively develop the learning process and its subject matter. This opportunity shall be a continuous permanent process.
>
> (c) Recognizes that the continuity between the early childhood education program and the home is essential.

And parents are to serve on advisory committees in connection with school improvement and education for migrant children. (Cal. Educ. Code, Sections 6499.3, 6464.3)

Apart from the statutory rights given parents, what chances do they have of shaping the educational program through the courts? No cases were found dealing with the question of under what conditions parents might obtain standing to challenge the school program. Presumably parents would

Parents may seek tuition payments for private school for five classes of handicapped youngsters: (1) educationally handicapped (i.e., those with learning disabilities or emotional handicaps); (2) physically handicapped; (3) mentally retarded; (4) severely mentally retarded; and (5) multihandicapped. (Cal. Educ. Code, Section 6870, 6871.5) The criteria used in deciding whether to grant the tuition include whether the state or the local district now provides appropriate special educational services, whether such services could reasonably be provided at reasonable cost, and/or if the available public services do not meet the needs of the child. The decision of the local district may be appealed to the county superintendent and, ultimately, to the state department of education. The following criticisms have been made of the California voucher system: (a) The standards for eligibility and review are so unclear that similar children from different districts may very well get different answers to their requests for tuition payments; (b) the amount of money spent on a child varies with the amount that the state and school district would spend on the child if he were attending a public special education program. Thus, children from wealthy school districts have more spent on them than those from poorer districts; and since the reimbursement varies by handicap, those children who would have relatively little spent on them if they were in public school may be unable to purchase any educational services with the voucher; (c) Private schools that accept these vouchers may charge whatever the traffic may bear, and may refuse admission to children whose handicaps are acute; (d) Parents are not informed of the availability of this money and are not represented at any stage of the decision-making processes. (David Kirp and Mark G. Yudof, Educational Policy and the Law, (Berkeley, California,: McCutchan Publishing Corporation, 1974), p. 717.)

Apart from the statutory rights given parents, what chances do they have of shaping the educational program through the courts? No cases were found dealing with the question of under what conditions parents might obtain standing to challenge the school program. Presumably parents would

have little difficulty obtaining standing in the courts to challenge that part of the program which affected their children. As we shall see below, the standing law with regard to taxpayers is fairly liberal in California, hence if people who arguably are remotely affected by governmental policies can obtain standing, then presumably parents can too. Whether the parent would have any success on the merits of the case is of course a separate question.

F. Pupils

Pupils have no statutory rights to control the educational program in general and to the extent they may be exempted specific course or program this depends upon what their parents agree to (as discussed above) or upon the discretion of the local district as in the case of excusing students from physical education. (Cal. Educ. Code, Section 8702, 8703) Indeed Section 10609 stipulates that "all pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers of the schools."

As for challenging the school program in the courts, no cases were found dealing with the standing of the student to do so. But presumably a student would have standing to challenge that part of the program which affected him or her. The Civil Code, Section 42, recognizes that a minor may enforce his right by civil action in the same manner as a person of full age, except that a guardian must conduct the same. And the Civil Code in Section 372 requires that a minor appear either by a guardian or guardian ad litem. Thus this section seems to open the door to a minor seeking judicial review of a program even if parents disagree with what the minor is attempting to do.

G. Taxpayers

Taxpayers as such have been given no direct authority over the school program. Thus, we have to consider whether they might be able to obtain standing to challenge in the courts aspects of the program with which they may disagree. Without discussing the point, a California court did let a taxpayer seek a writ of mandate to stop a released-time program in the school. (Gordon v. Board of Education of City of Los Angeles, 78 CA 2d 464, 178 P.2d 488 (1947).) But this was an Establishment Clause case and the granting of standing may be unique to this problem. The test as to whether a taxpayer gets standing today was stated by the California Supreme Court in 1972 roughly as follows: The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a court and not on the issues he wishes to have adjudicated. If the party has enough at stake to assure "vigorous prosecution of the case," then he may obtain standing. In that case, taxpayers were granted standing to prevent the sale of vacated streets. (Harman v. City and County of San Francisco, 7 Cal.3d 150, 496 P.2d 12, 101 Cal. Rptr. 880 (2972) (in bank).)

Obviously a test of this sort produces no automatic results and it is thus difficult to predict whether taxpayers would obtain standing in any given case. Presumably, if the matter were of general public interest such as the religion case cited above, taxpayers might be deemed sufficiently interested as to be likely to present the case vigorously. For example, taxpayer suits to enforce Sections 9002, 9240 and 9243 might very well be accepted by the courts. These statutes touch upon matters of general societal importance and it is not difficult to imagine that organized taxpayer groups might be quite vigorous in pursuit of enforcement of these provisions.

VII. Private Education

All children not specifically exempted according to certain statutory provisions are subject to compulsory full-time education. (Cal. Educ. Code 12101) Among the children who are exempt are "children who are being instructed in a private full-time day school by persons capable of teaching . . ." The school must be taught in English and "shall offer instruction in the several branches of study required to be taught in the public schools of the state." (Cal. Educ. Code, Section 12154) In addition, there are two other kinds of exemptions dealing with private instruction (Cal. Educ. Code, Sections 12154.5 and 12155):

§ 12154.5

> Children who are mentally gifted and who are being instructed in a private full-time day school by persons capable of teaching, where all or part of the courses of instruction required to be taught in the public schools of this state is taught in a foreign language with not less than 50 percent of the total daily instructional time taught in the English language, shall be exempted. The attendance of the pupils shall be kept pursuant to Section 12154.

§ 12155

> Children not attending a private, full-time, day school and who are being instructed in study and recitation for at least three hours a day for 175 days each calendar year by a private tutor or other person in the several branches of study required to be taught in the public schools of this State and in the English language shall be exempted. The tutor or other person shall hold a valid State credential for the grade taught. The instruction shall be offered between the hours of 8 o'clock a.m., and 4 o'clock p.m.

Students who violate these provisions may be deemed to be habitually truant and are then subject to a variety of possible treatments. (Cal. Educ. Code, Section 12401 et seq., and Juvenile Court Law, Section 600, 725) Parents who violate these provisions are subject to conviction on a misdemeanor and

can be punished by a fine and imprisonment in the county jail. (Cal. Educ. Code, Section 12452 and 12454) Neglect by the parent to provide proper education can also result in removal of the child from the parent's custody. (Juvenile Court Law, Section 726)

These provisions provide the basic framework for the regulation of private education in the state. With regard to this provision we first note the distinction drawn between attendance at a private school and instruction by a tutor. Tutors must hold a state certificate but teachers in the private school need only be persons capable of teaching. This distinction has caused parents trouble who have attempted to teach their children at home. Such forms of education have been called tutoring, hence have been deemed to fall under the certification requirement, something the non-certificated parent had hoped to avoid. (In Re Shinn, 195 CA 2d 165, 16 Cal. Rptr. 165 (1961).)

But whether the child goes to a tutor or to a private school, he must be instructed in the several branches of study required to be taught in the public schools. Again a distinction arises between the private school and tutor. The private school need only "offer" the required instruction but for a student to be legally instructed by a tutor, he must be instructed in the several branches required in the public school. Thus, attending a tutor means the student will end up with an education closer to that of the public school than he would necessarily if he attends a private school. Further, section 8573, which details the requirements for graduation (quoted above) for all pupils, makes no reference to private schools but does make a reference to public schools when it says students must among other things meet the standards of proficiency prescribed by the governing board. It is unclear whether this requirement is meant to apply to private schools, or to tutoring.

While it seems reasonably clear that children who are tutored must receive instruction in the common branches taught in the public schools, and that those branches of study need only be offered in the private schools, it is not clear to what extent the extensive educational code provisions dealing with the basic program in the public schools applies to either tutoring or private schools. That is, do the course content requirements apply as spelled out with regard to social studies or is it enough that social studies be taught or offered, as the case may be? Do the anti-discrimination requirements apply as well as the requirements regarding the depiction of the role and contribution of women and minority groups? None of this is clear from the statutes.

In short, California, like the other states studied, has little law on the books with regard to private educational efforts.

CHAPTER THREE

STATE OF FLORIDA

CURRICULUM LAW

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STATE OF FLORIDA CURRICULUM LAW

Introduction

Florida school law has undergone significant change over the past four years. The legislature has modified the relationships among the participants in the educational system by adding new participants to the system, parents and teacher unions; by giving new duties to the commissioner and department of education; and by enhancing the political power of the building principal, if not his formal legal authority. The pattern of authority which has emerged from these legislative changes is unlike the pattern found in any other state studied as part of this project. It is a pattern which tends to emphasize the monitoring-evaluation function of the state agencies, the broadening of the range of particpants in the decision-making process at the local level, and the enhancement of the authority and power of the school building principal.

The participants in the Florida system are: the legislature, governor and his cabinet which includes the commissioner of education, the department of education, the courts, the local school districts which are co-terminous with the counties of the state, superintendents, teachers, the teachers' unions, parents, students and the local public. The examination of the authority of each of these participants in the system will be taken up in the same order as in the other state reports.

I. The State Constitution

A. The State Responsibility

Article IX, Section 1 provides:

> Adequate provision shall be made by law for a uniform system

of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that needs of the people may require.

No cases were found construing this remarkable provision which is as far reaching as any provision found in any state constitution. The words "adequate provision", "free public schools", "that needs of the people may require" open the door to a variety of suits demanding of the state that certain educational programs be provided or that they be funded at a more adequate level than at present. For example, this provision would appear to open the door to demands for a right to special education, special English instruction for non-English speaking children, and perhaps even compensatory education for students achieving below grade level. Thus, unlike attacks based on the equal protection clause which may not be successful in protecting against the equal distribution of inadequate programs or in protecting against inequalities arising out of political, fiscal and administrative decentralization (San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).), this provision might be available to protect against just such contingencies.

Existing legislation underscores the premises implied in Article IX, Section 1. Thus, Section 229.011 of the Florida school law (FSL) states that "efficient operation of all schools and adequate educational opportunities for all children is retained by the state." Section 228.04 says that the free public school system "shall be liberally maintained." And Chapter 236, section 236.012, dealing with the financing of public schools begins: "The intent of the legislature is:

(1) To guarantee to each student in the Florida public system the availability of programs and services appropriate to his educational needs which are substantially equal to those available to any similar student notwithstanding geographic differences and varying local economic efforts.

These more general statements are backed up with such specific requirements as a duty on the part of local school boards to provide for an appropriate "program of special instruction, facilities, and services for exceptional students ..." The statutes define "exceptional students" as including (Section 228.041(1) (b): the educable mentally retarded, the trainable mentally retarded, the speech impaired, the deaf and hard of hearing, the blind and partially sighted, the crippled and other health impaired, the emotionally disturbed and socially maladjusted, and those with specific learning disabilities, and may include the gifted.

The newly adopted finance law of the state also is designed with the educational needs of these exceptional children in mind. In simple terms the statutes establish twenty six categories of students such as those students in grades 1-3, those in grades 4-10, and the various kinds of exceptional children. Each category of student is assigned a "cost factor", hence a student in grades 4-10 is assigned the cost factor of 1.0, while a visually handicapped child is assigned a cost factor of 10.0. In other words, a student in grades 4-10 is counted as 1 student but a visually handicapped child is counted as 10 students. The district then counts its students in each of these categories and multiplies the number of students in the category by the appropriate cost factor. The product of this multiplication is termed weighted full-time equivalant students. Then the district multiplies the total weighted full-time equivalent students by the base student cost for that year as established by the legislature, e.g., $745 in 1974. That figure can be added to to take into account the number of pupils that might be qualified for compensatory education as defined by such criteria as low achievement test scores,

socio-economic level, and low standard English comprehension level (Chapter 74-227, Section 236.081 (2).)

Because different districts have different costs of living, each year the legislature develops a list of cost-of-living factors for each county and that factor is multiplied by the figure previously computed in accordance with the steps in the preceding paragraph. To this figure is added what the district is to receive from various categorical aid programs, such as aid for bilingual programs. This final figure is the total amount of money that will be available to the district. Some of this money will be direct state aid and some of it will be made up from local funds. How much of that total must be provided out of local funds is determined by calculating the "required local effort." Without describing how that figure is arrived at here, simply note that that figure is subtracted from the large total previously calculated and what remains will be supplied by the state.

To assure that the students with the different cost factors actually receive the resources their presence in the district helped to generate another provision in the code provides (Chap. 74-63, amending Section 237.34(3).):

> By the 1976-77 fiscal year, eighty percent (80%) of current operation funds of the Florida education finance program shall be expended by basic program cost categories in each school that generates the funds and by special program cost categories in the district that generates the funds.

Thus the presence of exceptional children in a district brings more money into the district and 80% of the money brought into the district because of those exceptional children must be spent on them. An accounting scheme established by the same statutory provision helps to assure that

this will be done.

In sum, while Article IX, Section 1 of the Constitution has not been construed by the courts as assuring each child a right to an adequately supported program of the sort he needs, the legislature has taken steps in this direction through the new finance and related laws. There may of course still be problems under this scheme, since some exceptional children still may not get the service they need. The district need only spend 80% of the money generated by the presence of those children on their education and the legislation does not require that every exceptional child be in a program for exceptional children; the legislation only requires that there be programs for exceptional children. Finally, even if a child is in the appropriate program, whether it be for exceptional children or not, it is not necessarily the case that "adequate provision" has been made for the child. Reliance upon Article IX, Section 1 to obtain an improvement through the courts in the available educational program may still be necessary.

Indeed the stage may now be set in Florida for an extensive effort to improve the educational system through the courts. The theory behind such an attack might take the following form: if the courts were to understand that existing legislation were inspired by Article IX, Section 1, the courts may be willing to find ways of "building on legislative foundations, ways not necessarily contemplated or welcomed by the legislature." (Frank I. Michelman, "In Pursuit of Constitutional Welfare Rights: One view of Rawls' Theory of Justice," 121 U. Pa. L. Rev. 962, 1013 (1973).) That is, once the legislature had acted to protect the constitutional right of children to an education which is adequately provided for and which

meets their needs, the courts may take it upon themselves to perfect the work of the legislature and to see to it that the right upon which the legislation is premised is more fully realized. Thus the courts might inquire into the adequacy of the funding of these programs; might closely examine the eligibility requirements and definitions as to who is an exceptional child; might strictly interpret the delegation of authority to state officers and local officials to determine the eligibility requirements; might impose strict procedural due process requirements on the programs; or might require substantial equality in expenditures among the various categories of students "as a device for ensuring that at least minimum acceptable level of service will be attained for all." (Michelman, op. cit., p. 1013-1014.)

Whether in fact this future will be realized is another matter as much depends upon the role Florida courts conceive for themselves in relationship to the legislature. As will be discussed below, existing evidence suggests that the Florida courts do not relish the opportunity of becoming involved in what they call policy making. In any event, the conditions, because of recent legislative enactments, are now at least partially ripe for a further and judicially inspired reform of Florida education going beyond those changes briefly outlined in the Introduction and in this section of the report.

B. Role Allocation

As was mentioned in the Introduction, changes in the pattern of authority in the state recently have been made by the legislature. In carrying out these reforms the legislature must work within the confines of the state constitution which explicitly and implicitly addresses itself to the question of role allocation.

We have already seen that Article IX, Section 1 when interpreted to imply a right to an education may have a bearing on the delegation of authority. Other provisions which more directly address the question include Article IX, Section 2 which provides:

> The governor and the members of the cabinet shall constitute a state board of education, which shall be a body corporate and have supervision of the system of public education as is provided by law.

Article 4, Section 3 states "There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education..." That same provision also provides "The commissioner of education [who is an elected official] shall supervise the public education system in the manner prescribed by law."

Article IX, Section 4 provides:

> (a) Each county shall constitute a school district;... In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriately staggered terms of four years, as provided by law.
>
> (b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

Section 5 of the same article requires that there be a superintendent of schools in each school district and that he be elected for a four year term unless the district by resolution or by special law provides for the appointment of the superintendent.

Finally Article 3, Section 1 provides that "The legislative power of the state shall be vested in a legislature of the State of Florida...". Hence, the legislature is the ultimate source of influence over the educational system and as most observers of recent developments in Florida

would say, this has in fact been the case. The recent changes in the educational system outlined above are of legislative origin with strong support from the governor.

Put differently, while the Constitution provides the rough outlines of the governing structure for the public system of education, it is the responsibility of the legislature to fill in the details. But in filling in the details the legislature must work with two possibly inconsistent provisions. On the one hand, overall supervisory responsibility is placed in the state board of education, and on the other hand each school board is to operate, control, and supervise all the free public schools within the districts. There are two ways in which these provisions might be reconciled. First, they might be read to say that whatever the legislature does in designing the governing structure of education, it must place ultimate supervisory authority in the state board of education, and only to the extent that the legislature and state board have not preempted the field, may the local board exercise control and supervision. Under this interpretation the Florida system might be highly centralized with little discretion remaining at the local level. Alternatively, the two provisions might be read to require a sharing of authority and discretion between the two levels of government, and a prohibition against the extensive centralization that would be possible under the first interpretation. In other words, the two provisions taken together require that however the governing system is arranged it requires some significant degree of local control. At this point, it might be noted that the question of which is the correct interpretation is academic since the legislature has in fact assured local boards of education of considerable discretion and the cabinet has not in

fact attempted to exercise extensive control over the educational system. But we do have one indication as to how the Florida courts might choose between the two interpretations, and that case points to the first interpretation. In Arnold v. State, 190 So. 543 (1939) a challenge was brought to a state board of education rule requiring county boards "To appoint all school bus drivers, upon recommendation of the County Superintendent of public instruction, and to select duly qualified drivers in whom parents have confidence and a feeling of security for the safety and care of their children." The challenge was brought by a person who had been recommended for a bus driver's job by the superintendent but who had been turned down by the board because they did not believe the parents would have confidence in him. In seeking to get the job the petitioner argued, among other things, that the statute granting the state board authority to issue this regulation was unconstitutional in that it violated the doctrine against the delegation of legislative power. (The Florida law on this doctrine is explored below.) The statute pursuant to which the state board acted granted the state board authority to promulgate rules and regulations necessary to establish a uniform system of free public schools. The court said that such a broad grant of authority to the state board without any further standards or limitations on the board's authority was consistent with the Constitution. Hence, this case, while not directed specifically to the question of how much decentralization there must be in the system, is some indirect evidence of willingness of the courts to tolerate the grant of considerable authority to the state board of education -- even authority to regulate how bus drivers are to be hired. Additionally, Article IX, Section 4(b) with its emphasis upon control of education by

the county school board may by implication limit any legislative attempt to decentralize the school districts below the county level -- a point that may be important in light of the recent efforts (discussed below) to make the school building principal more powerful. Similarly any attempts on the part of the large county districts to decentralize themselves by delegating authority to control the district may be constrained by this same provision.

Another kind of obstacle the legislature must face in organizing the educational system of the state is the Florida version of the delegation doctrine. The discussion of this doctrine will take place in four parts: (i) the doctrine as applied to legislative delegation of authority to state officials; (ii) the doctrine as applied to the delegation to local agencies of government; (iii) the doctrine as applied to the delegation of authority to private groups; (iv) the doctrine as applied to the sub-delegation of authority.

(i) Testiment to the vitality of the delegation doctrine in Florida is found in the multitude of cases dealing with the question, a fact which brought forth this comment in 1970 from the Supreme Court of Florida: "Few questions are raised with more fervent consistency in constitutional litigation involving administrative agencies than the first several factors. First, if the delegation of authority is to stand it must be possible for a court to determine if the actions of the official or agency, to which authority has been delegated, is rationally related to the purposes established by the legislature. If the legislative scheme is so indefinite that almost anything the agency does might be deemed to be rationally related to some purpose, then the function of judicial review becomes a mere charade, and the legislation will not survive. The legislation must

establish a "pattern" with which the rule or regulation must conform. If a clear set of purposes is at least not established, then the legislation will have in effect abdicated its responsibility to legislate. (North Broward Hospital District v. Mizell, 148 So. 2d 1 (1962).) Thus, in Arnold v. State, op. cit., the court upheld a delegation of authority to the State Board of Education to promulgate rules and regulations because the authority was circumscribed by the fact that it must be exercised only to fulfill the purpose of bringing about the establishment of a system of free public schools in the state. This example shows, of course, that the purposes which limit the scope of the agency's authority need not be stated with great specificity.

But the inquiry into the validity of the attempt to delegate does not end with the application of this general test. The courts also ask a series of other questions which affect the outcome of the determination: is the interest now subject to control by the agency an important interest or even a right? If the state is attempting to regulate an individual right, could the exercise of that right -- absent appropriate state regulation -- lead to socially detrimental consequences. Could the delegation of authority as a practical matter have been accomplished with a great specification of the standards within which the discretion must be exercised? Is this an area where uncontrolled agency discretion is likely to result in unfairness and favoritism?

These points can be briefly illustrated. In several cases the court's decision to reject the claim of improper delegation was affected by its belief that the interest affected was not a "right." Thus in one case the authority of a hospital district was upheld on the ground, among

others, that a physician had no constitutional right to practice in these hospitals. (North Broward Hospital District, v. Mizell, 148 So. 2d 1,3 (1962).) Similarly in an attack on an ordinance granting the municipal inspector the power to issue and transfer liquor licenses, the court said that there was no inherent right to sell liquor. (Paramenter v. Younan, 31 So 2d 387 (1947). And in Day v. City of St. Augustine, an attack on a statute which permitted the city to erect a bridge and charge a toll was rejected on the ground among others that the citizens of the city had no right to the use of the bridge in the way they had a right of access to the city streets. However, the recognition that the affected activity was a "right" seemed to help in leading to the striking down of a statute delegating authority to the Barbers' Sanitary Commission to prescribe and enforce rules and regulations fixing minimum prices to be charged for barber services and the hours when the barber shops may be operated. (Robbins v. Webb's Cut Rate Drug Co., 16 So. 2d 121 (1943), rehearing denied 1944).

While it is often not clear from the cases exactly how much weight the courts place upon the nature of the interest affected by a regulatory scheme, it is clear that the Florida courts are sympathetic to the argument that the legislature could not have been more specific in the delegation of authority. Thus in State Department of Citrus v. Griffin, op. cit., the court upheld the delegation of board authority to manipulate the supply and demand for citrus on the ground that "only a general scheme of policy can with advantage be laid down by the legislature." (p. 581) But in Dickinson v. State, 227 So. 2d 36 (1969) the court struck down a scheme for licensing cemeteries because it lacked sufficient standards opening

the way to "unfairness and favoritism."

Obviously in simply raising the questions outlined above a Florida court is not automatically led to an answer as to whether the challenged legislation does constitute an improper delegation of authority. This point is underscored by the surprisingly inconsistent results that have been handed down. On the one hand, as might be expected the courts have struck down regulatory schemes which merely gave power to an agency to permit the transfer automobile transportation brokerage licenses when it was in the "public interest" to do so. (Delta Truck Brokers v. King, 142 So. 2d 273 (1962).) In another case which provides a good contrast with the state of the law in New York, the state Supreme Court struck down a scheme of licensing "psychologists" on the ground that the legislature failed to define the term psychologist, (Husband v. Cassel, 130 S. 2d 69 (1961).) On the other hand, the Supreme Court has also struck down legislation which was considerably more precise. In Mahon v. County of Sarasota, 177 So. 2d 665 (196 the Supreme Court struck down the Sarasota County Lot Clearing Act which provided for the elimination, as nuisances, of accumulations of trash, refuse, filth, garbage, unsanitary or other noxious matter, and of heavy, dense or dank growths of weeds, grass, underbrush, palmettos, or other vegetation, which constitutes a health, fire, or traffic hazard. Only those accumulations of refuse or vegetation which are within 200 feet of a "structure" may be found to be a nuisance as a health or fire hazard; and to constitute a traffic hazard, the vegetation must be more than two and one-half feet in height and within fifty feet of an "intersection." Because the statute did not define the terms "structure" and "intersection" the law was struck down.

Five years later in Flesch v. Metropolitan Dade County, 240 So. 2d 504 (1970) a lot clearing ordinance was upheld which provided:

> The existence of excessive accumulation or untended growth of weeds, undergrowth or other dead or living plant life upon any lot, tract or parcel of land, improved or unimproved, within one hundred feet (100') of any improved property within the unincorporated areas of this county to the extent and in the manner that such lot, tract or parcel of land is or may reasonably become infested or inhabited by rodents, vermin or wild animals, or may furnish a breeding place for mosquitoes, or threatens or endangers the public health, safety or welfare, or may reasonably cause disease, or adversely affects and impairs the economic welfare of adjacent property, is hereby prohibited and declared to be a public nuisance.

This court found that the ordinance was more specific than the law in Mahon insofar as determining what is an improved piece of land is more easily accomplished than determining what constitutes a structure. Also this provision states more specifically under what conditions action may be taken to clear the land.

The difficulties of determining when the courts will act to strike down a law are made complicated again by Register v. Milam, 188 So. 2d 785 (1965). There the court upheld a system for selecting apprentices to port pilots; these apprentices in turn are the only people eligible to become port pilots when vacancies occur. The court admitted that no criteria were specified in the statute but said it was not convinced any criteria were needed. "We find nothing fundamentally wrong in the choice by the pilots, or by the pilot agreeing to have the understudy assigned, or apprenticed, to him, of a person related to him or liked by him." (p. 787)

Given the nature of the doctrine against the delegation of legislative authority as it has developed in Florida we can see that, for example, compared to New York the Florida version of the doctrine has more bite. Florida

courts will still seriously entertain the possibility that a statute does improperly delegate legislative authority. At the same time, the courts have not been consistent in their resistence to very general grants of authority. Thus making predictions as to when a law will fall is difficult. But we can see that because of the concern of the Florida courts with regard to the delegation of authority to officials who may then affect important personal rights of individuals, if education should come to be deemed a constitutional right under the Florida Constitution, then the courts may pursuant to their own delegation doctrine examine more closely delegations of authority in the educational area. There is, in other words, a potential for an even stronger judicial resistance to delegations of authority in the education area than now exists.

(ii) Delegations of authority to local educational officials are examined by the courts in light of the doctrines outlined above. (Day v. City of St. Augustine, op. cit.) But here again judicial scrutiny of such delegations of authority is likely to be more intensive underneath Florida's own doctrine against delegation of authority as education becomes to be viewed as an important personal right.

(iii) Few cases were found which would be helpful in illuminating what the judicial reaction would be to a grant of authority to parents to participate in the control of the curriculum of a given school building. The bulk of the cases which touch upon the delegation of authority by the legislature to private groups involve the incorporation in statutes of standards promulgated by private associations -- standards which are to be followed by state officials in exercising their discretion. The basic

rule which emerges from these cases is that such incorporation by reference of standards promulgated by private associations is permitted if the statute makes clear that the standards referred to those in existence at the time the statute was passed and does not also include all future standards the private association may issue. (Spencer v. Hunt, 147 So. 282 (1933); State v. Dee, 77 So. 2d 768 (1955).) (It might be noted, however, that in education there exists one area where a private association continues to enjoy extensive control over public policy -- control which has not been challenged on the ground of an improper delegation of authority. The Florida High School Activities Association, Inc. is a non-profit association, the members of which are the principals of almost all public and private high schools in the state. This organization controls all inter-scholastic athletic activities in Florida. In order for high school students to participate in inter-scholastic activities, the principal must be a member of the association and the student must be in compliance with its by-laws. That the association exercises public authority was made clear in one case in which a student challenged the rules on the ground he was deprived of due process of law. On appeal from a dismissal of the complaint the district court of appeal ruled the association's activities were state action and the complaint should not be dismissed. (Lee v. Florida High School Activities Association, Inc., 291 So. 2d (1974).)

The limitations imposed in the previously cited cases upon the incorporation of standards promulgated by private associations clearly suggests that Florida courts would not accept a real delegation of authority to private groups. This conclusion is underscored by State v. City of Tallahassee,

177 So. 719 (1937) which struck down a city ordinance providing that no license would be issued for a pool and billiard room unless, among other things, the applicant obtained a petition with 100 signatures of taxpayers including the owners of sixty percent of the property fronting on the street where the pool parlor is to be located and also on the block adjoining thereto on the north and south and/or the east and west of said block. The court said the execution of a law "cannot be made to depend on the unbridled discretion of a single individual or an unduly limited group of individuals." (p. 721) Thus we are merely left with a bare hint of the thinking of the court -- a hint which might be expanded upon in the following way. The nature of the veto power granted to the owners of 41% of the property fronting on the streets in question, the self-interested nature of this group and its lack of accountability all point in the direction of the likelihood of unfair treatment of the individual seeking the license. This possibility coupled with recognition that the individual right at stake is the carrying on of a lawful business, suggests that the delegation of authority may not stand. (Also see Amada v. Town of Daytona Beach, 181 So. 2d 722 (1966).)

It thus appears the Florida courts along with the courts of other states such as New York and Arizona, would not lightly accept the delegation of uncontrolled discretionary authority to parents. But the few existing cases hardly constitute a strong basis upon which to predict judicial reaction to all the possible ways in which parents might authoritatively be given some authority to control the curriculum to which their children are exposed. Perhaps the main obstacles to significant parental involvement in the control of the public school curriculum remains Article IX, Section 4.

(iv) The allocation of authority within the state or a local district may take place either by direct legislative action, or by the sub-delegation of authority by those who were the original recipients of authority from the legislature. As we have seen a challenge to delegation of authority by the legislature raises an issue of the violation of Article III, Section 1. Only the legislature itself can violate Article III, Section 1, as only it has the legislative authority which may not be delegated. Hence, the issues involved in a challenge to the sub-delegation of authority are different from those we have been dealing with to this point. The first question in a challenge to a sub-delegation of authority is (a) whether the officer or agency sub-delegating the authority has been given the statutory authority to delegate his/its discretionary authority. Then if it is decided that authority to sub-delegate exists, we may have to ask whether (b) this authority to sub-delegate is constitutional on its face. For example, in the case of Florida if the state board of education had statutory authority to delegate its authority, this may be a violation of Article IX, Section 2. Similarly statutory authority of a county board of education to delegate its authority may be a violation of Article IX, Section 4. If the authority to sub-delegate is constitutional we may still have to ask (c) whether the execution of the authority to sub-delegate was carried out in accordance with the statute, and, if so, (d) whether the execution of the authority has been carried out in accordance with such provisions of the constitution as Article IX, Sections 2 and 4. Additionally, sub-delegations of authority must survive the same tests which are applied to delegations of authority by the state legislature. That is, sub-delegations of authority must meet such requirements as that they be

accompanied by express guidelines and standards. (City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (1972).) The cases do not make clear the constitutional source of this requirement. As a matter of logic the source of the requirement could not be Article 3, Section 1 which vests all legislative power in the state legislature because that provision applies to the state legislature and not to subordinate units of government. In any event it would make no sense to say a school district may not delegate legislative power since Article 3, Section 1 prohibits the legislature from giving the school district legislative power in the first place; hence the school district presumably does not have the power to give away. Thus the prohibition against sub-delegation without appropriate standards may rest upon the same notion of due process i.e., the sub-delegation of power without appropriate standards violates the due process rights of individuals insofar as arbitrary power is given to a public official to affect individual rights of liberty and property.

It might be noted that this series of questions is relevant whether one is concerned with sub-delegation by state officials to elected or appointed local officials, or with sub-delegations by local officials (elected or appointed) to others within the local district who also may be employees of the district, or private individuals or groups.

Turning to issue (a) it appears that a case of sub-delegation of authority will not in all likelihood be disfavored in the Florida courts on the ground that the official doing the delegating lacked the statutory authority to delegate in the first place. As one court has said: "It is the well settled rule in this state that if a statute imposes a duty upon a public officer to accomplish a stated governmental purpose,

it also confers by implication every particular power necessary or proper for complete exercise or performance of the duty that is not in violation of law or public policy." (Peters v. Hansen, 157 So. 2d 103, 105 (1963).) In saying this, the court upheld a contract between the county tax assessor and a private company hired by the assessor to carry out some of his duties. Then the court added "He has the implied power to employ persons to do work of a clerical or ministerial nature, requiring no exercise of official discretion, and involving no substantial rights of persons against whom assessments are made, where such work is done under his supervision, or he ratified or adopts it." (p. 105)

No cases were found discussing issues (b) and (c) and the cases discussing issue (d) tend to uphold the delegation of authority. In Blitch v. City of Ocala, 195 So. 406 (1940) the court upheld the delegation, by the city to the city manager of authority to issue permits which must be obtained before any construction or repair work could be carried out within the city. The central issue of the case was not, however, the fact that authority had been delegated to the city manager but that in carrying out his delegated duties he had to adhere to the specifications of the National Board of Fire Underwriters, a private association. The court upheld the delegated authority by interpreting the ordinance as incorporating only those standards which had already been promulgated by the private association at the time of the adoption of the ordinance. In Permenter v. Young, 31 So. 2d 387 (1947) an ordinance giving the Municipal Inspector authority to refuse the issuance or transfer of liquor licenses was challenged on the ground that it vested in the inspector arbitrary discretion. The case never made clear whether this was a constitutional or statutory challenge

or what provision of the state constitution the challenge or what provision of the state constitution the challenge may have rested on. In any event, the delegation was upheld on the ground that there was no inherent right to sell intoxicating liquors and that there was always an appeal either to the city council and/or the courts for a refusal to issue or transfer a license. The court also added it was not necessary to prescribe a specific rule of action when the discretion relates to matters within police regulation. All in all the opinion, which relies heavily on quotations from American Jurisprudence and McQuillian on Municipal Corporations, 2d. Ed., Revised, is highly unsatisfactory and provides only a somewhat reliable guide as to what Florida courts might do with a case involving a challenge to the sub-delegation of authority.

One of the lot clear cases discussed above involved a local ordinance under which the County Manager was given authority to clear lots he deemed to constitute a nuisance as defined by the ordinance. The ordinance was upheld in an opinion which distinguished the ordinance in question from a more general statutory provision which had been struck down in a prior case. (Discussed above.)

When we come to City of Miami Beach v. Fleetwood Hotel, Inc., 262 So. 2d 801 (1972), we find a case in which a sub-delegation of authority was struck down. In that case authority was delegated by the city council to a city rent agency to establish the maximum rents which may be charged. The court struck down such provisions as the one which permitted the agency to set aside any rent resulting from "illegality, irregularity, or fraud" because they lacked sufficiently precise standards. The court wrote, "However, when statutes delegate power with inadequate protection against

unfairness or favoritism, and when such protection could easily have been provided, the reviewing court should invalidate the legislation." (p. 806)

In sum, there is little Florida case law on the question of sub-delegation of authority but what law there is suggests that the sub-delegation of authority will be approved. There are probably however some outer limits to what will be approved -- outer limits that are not well defined and would not constrain the kinds of sub-delegations that one might expect to take place within the educational system. Even if, for example, Florida county boards of education were on their own volition to undertake to decentralize their operations, it is unlikely they would do so in ways that clearly violated Article IX, Section 4. The county boards might, for example, delegate extensive authority to their principals to control the curriculum in their building subject to ultimate approval by the board. This formula would in all probability pass court scrutiny. Again, however, it is plausible to assume that such a sub-delegation of authority would receive greater scrutiny if the courts accepted Article IX, Section 1 as establishing a right to an education. All in all, the doctrine surrounding the sub-delegation of authority in Florida is not likely to affect in important ways the allocation of authority to control the school curriculum.

C. Individual Rights

While not explicitly dealing with the allocation of authority to control the curriculum, those provisions of the Florida Constitution which touch upon civil rights also could affect who may control the curriculum. The relevant provisions from Article I are listed:

2. Basic rights

All natural persons are equal before the law and have inalienable

rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.

3. Religious freedom

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

4. Freedom of speech and press

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

5. Right to assemble

The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.

6. Right to work

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not

shall not have the right to strike.

9. Due process

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Despite the potential of these provisions for affecting the authority to control the curriculum in the public schools, e.g., Section 4 could provide a basis for the academic freedom of the teacher, few cases were found interpreting these provisions which were relevant to the problem at hand. The few relevant cases dealt with the issue of religion in the public schools. What these cases make clear is that but for the U.S. Supreme Court, religious exercises as well as mandatory flag salute exercises could be part of the public school program. Thus, for example, the Florida Supreme Court in a decision which pre-dates West Virginia v. Barnette, 319 U.S. 624 (1943), upheld a requirement that students salute the flag despite religious objections thereto. (Bleich v. Board of Public Instruction for Hillsborough County, 190 So. 815 (1939).) And the Florida Supreme Court has approved the recitation of the Lord's Prayer in schools and readings from the Bible even after the Schempp decision had been issued by the U.S. Supreme Court. (Chamberlin v. Dade County Board of Public Instruction, 160 So. 2d 97 (1964).) This decision was, of course, reserved on appeal to the U.S. Supreme Court. (Chamberlin v. Dade County, Board of Public Instruction, 377 U.S. 359 (1964).) More recently the Attorney General of the State of Florida issued an opinion stating that it was not contrary to opinions of the U.S. Supreme Court for the School Board of Broward County to set aside time in opening exercises for individual prayer and Bible reading or meditation. "However," the

Attorney General wrote, "there does not seem to be any constitutional prohibition against providing for a period of silent private recollection, meditation or silent prayer to prepare oneself for the coming day. The purpose of this period could well be for the student to collect his thoughts, examine his goals and reevaluate his purpose in life so that he may function in an organized and directed manner throughout the day, or the student might elect to use this silent period for whatever purpose, including private prayer which fits his needs or desires." (Opinion of the Attorney General, 071-196 (1971).) (A comment on the validity of this conclusion is provided in the New York review, where it was concluded that there is a strong possibility that such arrangement may in fact be unconstitutional contrary to the opinion of the Attorney General.) And it might be noted that Section 233.062 of the Florida School Laws provides "The school board may install in the public schools in the district a secular program of education including but not limited to an objective study of the Bible and of religion."

Because of the lack of litigation based on the Florida "bill of rights" we must conclude that these provisions do not today play an important role in affecting the allocation of authority to control the curriculum in Florida. To the extent individual rights speak to the question of the allocation of authority, it must be those rights based in the U.S. Constitution.

II. Legislature

In this section we provide an overview of the educational system as established by the legislature. The work of the legislature can be divided up into four categories: (1) The further specification of the relationship of the participants in the educational system; (2) The establishment of administrative procedures according to which the system must operate;

(3) Direct legislative control of the child's education by specification in statutes of which children should receive which kind of educational program; (4) The establishment of compulsory education requirements.

(1) A starting point for understanding the Florida School Laws is Section 229.011:

> Public education is basically a function and responsibility of the state. The responsibility for establishing such minimum standards and regulations as shall tend to assure efficient operation of all schools and adequate educational opportunities for all children is retained by the state.

In keeping with this provision Section 229.053 provides:

> The state board of education is the chief policy-making and coordinating body of public education in Florida. It has the general powers to determine, adopt or prescribe such policies, rules, regulations, or standards as are required by law or as it may find necessary for the improvement of the state system of public education. Except as otherwise provided herein it may, as it shall find appropriate, delegate its general powers to the commissioner of education or the directors of the division of the department.

State board control is reinforced by Section 229.041:

> All rules and regulations and minimum standards adopted or prescribed by the state board in carrying out the provisions of the school code shall, if not in conflict therewith, have the full force and effect of law.

The commissioner of education who is an elected official is part of the state board of education and serves as its secretary and executive officer. (FS 229.012) The department of education is in effect the staff and administrative arm of the state board.(FSL Section 229.75 and 229.76.) And Section 230.03 provides with regard to the local districts:

> The district school system shall be considered as a part of the state system of public education. All actions of district school officials shall be consistent and in harmony with state laws and with the rules and regulations and minimum standards of the state board. District school officials, however, shall have the authority to provide additional educational opportunities, as desired, which are authorized but not required by law.

Taken together these statutes clearly imply a hierarchal arrangement within the state with the state board of education being the superior of the local districts. As will be seen in the next paragraphs and sections of the paper the relationship is not quite so simple.

First of all, interviews suggested that the officals in the department of education have not behaved as though they were the bosses of the local districts and have in fact been sensitive to resistance from local officials. There may be other factors which account for this but one important factor is the political context in which state officials work. Ultimate control and supervision of the educational system rests in the state board, and it must be remembered the state board is made up entirely of elected officials who are dependent upon the political support of the people in the local communities. The state board, commissioner and the department of educators are all constrained by this political reality.

Secondly, recent legislative reforms have changed the relationship between the state and local educational agencies. The new textbook selection law (discussed below) has made the local district a more important participant in that process. The new state finance law has removed much of the control over the raising of money from the local district and placed it in the hands of the state legislature. Additionally, as discussed above, the money is to be allocated within the district in accordance with legislative priorities as stated in Section 237.34(3) as amended by Chapter 74-36. A further effect of this provision will be to place greater authority in the hands of building principals. The rule forces the district to spend 80% of the money it got, for example, for having handicapped school children in certain buildings, in those buildings which have the handicapped kids. Thus the principal has a basis for going

to the board to demand his legally sanctioned share of the state funds. The new laws establishing an accountability mechanism have similar centralizing and decentralizing effects. Thus the state has been given new powers to collect information on student achievement and on the distribution of financial resources within school districts. (FSL Sections 229.57; 237.34 as amended by Chapter 74-227). Hence the state can now monitor the entire educational system and can use this information to bring pressure to bear to correct problems and abuses. But at the same time, the local district has not been told how it must go about trying to improve student performance on the objectives being measured by the state wide assessment program. Discretion as to how these objectives can best be met is left in the hands of the local professionals and boards.

In brief, while state-local relationships have never fully followed a hierarchal pattern, the recent changes in the state law have modified the picture even further. In its role as monitor of the system the state is in a position to cajole and push but is not expected to mandate educational policy. At the same time the state will not be able to long ignore the pressures placed upon it rising from public disclosure of the information collected by the state. Thus in a way the position of the state may have been strengthened vis-a-vis the local district despite the fact that the public rhetoric suggests that the state agencies should be moving away from a role in which they mandate policy which the local districts are to follow.

(2) The 1974 legislature also enacted a substantial revision of the state's Administrative Procedure Act -- an act which establishes the procedures all "agencies" in the state must follow in issuing, for example,

rules and orders. "Agency" is defined to include the state board of education, department of education, as well as local schools districts. (Chapter 74-310, Section 120.52 (1).) Additionally the act provides for a variety of mechanisms by which the rules and orders of these agencies might be challenged before the agency in question or in the courts. Some of the details of these provisions will be taken up below.

Of particular interest here is that the same act provides for continuous oversight by the legislature of the rule making activities of the state board of education and department of education. A rule is defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of an agency and includes the amendment or repeal of a rule. The term does not include internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public, legal memoranda or opinions issued to an agency by the attorney general or agency legal opinions prior to their use in connection with the agency action or the preparation or modification of agency budgets, contractural provisions reached as a result of collective bargaining, or agricultural marketing orders under chapters 573 or 601." (Chapter 74-310, Section 150.52 (13).)

Continuous oversight of the state level educational agencies is provided for in the following way. A new section 11.60 was adopted to create a standing joint committee of the legislature composed of six members - three from the house and three from the senate appointed by the speaker of the house and president of the senate, respectively. At least one of the house and senate members must be from the minority party.

Subsection (2) of this same provision states the committee shall maintain a continuous review of the statutory authority on which each administrative rule is based and agencies must advise the committee whenever a court significantly changes the authority of the agency. Beyond this Section 120.54(10) of the newly adopted Administrative Procedure Act, Chapter 74-310 provides that an agency proposing to adopt a rule (for these purposes the term agency does not include school districts) must file with the joint committee a copy of the rule, a detailed written statement of the facts and circumstances justifying the proposed rule and the notice of the proposed rule making required by another section. "The committee shall examine the proposed rule and its accompanying material for the purpose of determining whether the proposed rule is within the statutory authority on which it is based, as a legislative check on legislative created authority. If it disapproves the rule, the committee shall certify the fact to the agency proposing the rule, together with a statement detailing with articularity its objections to the proposed rule prior to the time the rule becomes effective."

The agency may refuse to withdraw or modify the rule and still may proceed toward adoption of the rule by following the additional steps specified by the statute including filing the proposed rule with the department of state along with the summary of hearings and the detailed written statement of the facts and circumstances justifying the rule. But also filed at the same time would be the statement of the joint committee disapproving the rule and this would become part of the public record. The proposed rule becomes effective twenty days after filing or on a later date as specified in the rule or as specified by a relevant statute.

It would appear then that the joint committee's statement whether approving or disapproving of the proposed rule would come to play an important role in any subsequent challenges brought by parties affected by the rule -- in challenges brought directly to the agency pursuant to Sections 120.57 and 120.54(3) and 120.56 as well as in challenges brought in the courts pursuant to those same provisions in addition to Section 120.68. While none of these provisions specifies what weight is to be given to the opinion of the joint committee, it would seem that the courts are not likely to totally disregard this legislative interpretation of the enabling act under which the agency is operating. Thus, the legislature has provided for a continuing influence upon the actions of the state board of education and department of education. The importance of the legislature in Florida educational politics is once again underscored.

(3) Some of the reform efforts and a body of older laws represent a different approach to control of education in the state than represented by the new accountability thrust. The significance of many of these laws is that they reflect direct legislative control of the child's education rather than legislative role allocation. Thus, for example, the basic provision controlling the curriculum in the public schools provides: (FSL Section 233.061) Required instruction.

> Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the school board, shall teach efficiently and faithfully, using the books and materials required, following the prescribed courses of study, and employing approved methods of instruction the following: The essentials of the United States constitution, flag education, including proper flag display and flag salute, the elements of civil government, the elementary principles of agriculture, the true effects of all alcoholic and intoxicating liquors and beverages and narcotics upon the human body and mind, kindness to animals, the history of the state, conservation of natural resources, and such additional materials, subjects, courses, or fields in such grades as may be prescribed by law or by regulations of the state board and the school board in fulfilling the require-

ments of law; provided, that state and district school officials shall furnish and put into execution a system and method of teaching the true effects of alcohol and narcotics on the human body and mind, provide the necessary text-books, literature, equipment, and directions, see that such subjects are efficiently taught by means of pictures, charts, oral instruction, and lectures and other approved methods, and require such reports as are deemed necessary to show the work which is being covered and the results being accomplished, and provided further, that any child whose parent shall present to the school principal a signed statement that the teaching of disease, its symptoms, development and treatment, and the viewing of pictures or motion pictures of such subjects conflict with the religious teachings of their church, shall be exempt from such instruction, and no child so exempt shall be penalized by reason of such exemption.

Beyond these provisions, Section 230.23 (m) imposes on districts the requirement that they provide for an appropriate program of special instruction, facilities, and services for exceptional children, i.e., the handicapped and gifted children. And Section 230.23 (h) requires districts to offer vocational schools, departments or classes. The department of education has been directed to develop and implement regulations providing for practical courses of direct job-related instruction in each school district in the state. (233.068) This requirement is in addition to the authority school districts already have, after obtaining approval from the department of education, to operate area vocational-technical centers. (FSL Section 230.63.) And the legislature has also specifically required that schools offer and children take two other courses:

233.064 Americanism vs. communism; required high school course. --

(1) The legislature of the state hereby finds it to be a fact that
(a) The political ideology commonly known and referred to as communism is in conflict with and contrary to the principles of constitutional government of the United States as epitomized in its national constitution,
(b) The successful exploitation and manipulation of youth student groups throughout the world today are a major challenge which the free world forces must meet and defeat, and
(c) The best method of meeting this challenge is to have the youth of the state and nation thoroughly and completely informed as to the evils, dangers and fallacies of communism by giving them a thorough understanding of the entire communist movement, including its history, doctrines, objectives and techniques.
(2) The public high schools shall each teach a complete course of not less than thirty hours, to all students enrolled in said public high schools entitled "Americanism versus communism."
(3) The course shall provide adequate instruction in the history,

doctrines, objectives and techniques of communism and shall be for the primary purpose of instilling in the minds of the students a greater appreciation of democratic processes, freedom under law, and the will to preserve that freedom.

(4) The course shall be one of orientation in comparative governments and shall emphasize the free-enterprise-competitive economy of the United States as the one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth.

(5) The course shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism, and the false doctrines of communism.

(6) The state textbook council and the department of education shall take such action as may be necessary and appropriate to prescribe suitable textbook and instructional material as provided by state law, using as one of their guides the official reports of the house committee on un-American activities and the senate internal security sub-committee of the United States congress.

(7) No teacher or textual material assigned to this course shall present communism as preferable to the system of constitutional government and the free-enterprise-competitive economy indigenous to the United States.

History. -- Sections 1-7, 9, ch. 61-77; Section 25, ch. 65-239; Sections 15, 35, ch. 69-106.

Note. -- Formerly Section 230.23 (4) (1).

Driver education must also be provided but students are not required to enroll. (FSL Section 233.063) And Section 233.062 specifically authorizes school districts to offer a program involving the objective study of the Bible and of religion. Other provisions establish categorical grant programs for support of reading, health education and courses on the environment. (FSL 233.057; 233.067; 229.8055)

Another way of viewing the legislature's direct intervention into the school program is to take note of the classification of pupils that the legislature has established with regard to whom different state minimum educational requirements are applicable. This list is as follows:

a. Students in Grades 1,2,3

b. Students in Grades 4 - 10

c. Students in Grades 11 and 12

d. Students Defined as Exceptional Children

1. educably mentally retarded
2. trainable mentally retarded
3. speech impaired
4. the deaf and hard of hearing
5. the blind and partially sighted
6. the crippled and other health impaired
7. the emotionally disturbed
8. socially maladjusted
9. learning disabilities
10. the gifted
11. hospital and home bound

e. Students with low achievement test scores, from families of a low socio-economic background

f. Students with low standard English comprehension

g. Students in vocational programs

h. Married students

i. Unmarried but pregnant

j. Students who have previously had a child out of wedlock

k. Students whose physical, mental, or emotional condition is such as to prevent their successful participation in regular or special education programs for exceptional children

l. Dependent children

m. Delinquent children

While the materials below will provide more details about most of these classifications, some features of the laws establishing these classifications need to be noted. As with Section 233.061 we have here direct control of the child's education by the legislature. Each category of child is to be given certain educational inputs -- but the specification of what is to be provided is at best stated in general terms. The state board, commissioner, department of education and local district are all left with considerable discretion in establishing the criteria as to which child belongs in which category. It is this very sort of delegated authority that Article IX, Section 1 may lead a court, as discussed above, closely to scrutinize, since the authority to classify children is the authority to determine which child will have access to which program.

(4) The categories "h" through "m" are found in the compulsory education and neglect laws of Florida, the third major body of legislative inactments. These laws specify the ages during which children must attend school, what constitutes compliance with the attendance laws, and which children may be placed in special classes or programs or exempted from

school altogether. As in other states it is basically this body of which regulates private educational efforts and specifies the duties of parents with regard to the education of their children. A more detailed discussion of these provisions is reserved for the last section of this review.

III. State Board, Commissioner, Department of Education

A simple reading of the statutory provisions dealing with the duties and responsibilities of the state board of education, the commissioner, and the department of education reveals a pattern of authority running from the board, to the commissioner to the department. But the relationship between the Commissioner and the state board as reflected in the law is not quite so simple. Interviews suggested that the nature of the relationship between the Commissioner and the state board can vary depending on the personalities involved. A strong commissioner with ideas of his own can play a larger role, always subject to the ultimate control of the state board, than a weak commissioner who is content not to push new educational policy. There are several sources for this potential influence of the commissioner. (1) The commissioner is an elected official in his own right and, unlike, the New York State Commissioner is not subject to being fired at will by the state board. (2) Some statutory provisions make clear that it is the commissioner who has the primary responsibility for establishing and operating a particular program. For example, a categorical aid program designed to aid schools in improving the safety of their facilities has been left to the commissioner to operate. (FSL 232.255.) (3) As a practical matter, because the commissioner is involved full-time in educational affairs, and because he presumably has more accurate information than other members on the state board with regard to educational matters,

his opinion probably carries more weight at state board meetings.

These facts must be counterbalanced with the recognition that the Governor, who is also a member of the board, has his own staff devoted exclusively to educational affairs as do the committees of the legislature dealing with education. Both these staffs cooperate and have their own means of obtaining information about the operation of the educational system. Hence the Governor and legislature can be with regard to information, on an almost equal footing with the commissioner.

The most recent and important example of the ability of the legislature and governor to cooperate on formulating educational policy in the face of indifference or perhaps even hostility from the department of education and commissioner, is the creation in the summer of 1971 of the Governor's Citizens' Committee on Education. The committee was appointed by the governor and funded by the legislature and given the task of surveying almost every fundamental aspect of the education system in the state. The report which emerged from the effort two years later touches upon school finance, governance, the curriculum and program, teacher training, school services, and the relationship of the school and community. Much of the report has been enacted into law, most notably the recommendations with regard to changing the system for financing the public schools. Other important recommendations which have been enacted into law include a new financial accounting system (discussed below); a requirement that each school issue an annual report of progress to the parents; and the requirement that each district establish a parent advisory council. Notable recommendations which have not been fully acted upon touch upon improving

compensatory education and education for children of migrant workers.

At any rate, what is clear from this recent experience is that educational reform can suddenly overtake and even overwhelm the commissioner and department of education. Since the issuance of the Citizens' report a new commissioner of education has come to Tallahassee, who to most observers seems more willing to take some initiative and to try to exercise some of the potential power any commissioner enjoys. He will be working, however, under the close scrutiny of the staffs of both the governor and legislative committees concerned with education.

In sum, the formulation of educational policy in Tallahassee could be importantly influenced by an active and astutue commissioner, but the recent history has shown that if the commissioner is inactive, control of policy may simply be seized by the legislature and governor.

With this background in mind we propose to discuss several important functions of the state board, commissioner, and department of education which have a direct bearing upon the curriculum of the public schools: (A) State-wide Assessment; (B) Accreditation; (C) Comprehensive Information and Assessment System; (D) Textbook Selection; (E) State Regulation of Local Districts.

A. State-Wide Assessment

Section 229.57 is entitled "The Educational Accountability Act of 1971 and provides:

> (1) SHORT TITLE.--This section shall be known and may be cited as "The Educational Accountability Act of 1971."
>
> (2) PURPOSES: INTENT.--The purposes of this section are to provide for the implementation and further development educational assessment procedures as required by § 9(1), chapter 70-399, Laws of Florida, and the plan for educational assessment in Florida, developed by the commissioner of

education pursuant to this chapter;

(a) To provide for the establishment of educational accountability in the public educational system of Florida;

(b) To assure that education programs operated in the public schools of Florida lead to the attainment of established objectives for education;

(c) To provide information for accurate analysis of the costs associated with public education programs; and

(d) To provide information for an analysis of the differential effectiveness of instructional programs.

(3) Educational Accountability Program.--The commissioner of education is directed to implement a program of educational accountability for the operation and management of the public schools, which shall include the following:

(a) Pursuant to subsection 229.053(2)(e) the commissioner, with the approval of the state board of education, shall, no later than November 1, 1972 and each year thereafter, establish major or ultimate, specific uniform statewide educational objectives for each grade level and subject area, including, but not limited to, reading, writing, and mathematics, in the public schools.

(b) The commissioner shall develop and administer a uniform, statewide system of assessment based in part on criterion-referenced tests and in part on norm-referenced tests to determine periodically pupil status, pupil progress, and the degree of achievement of established educational objectives. Such system shall include procedures for assuring comparability where appropriate between student performance information collected and reported by this system and national indicators of student performance.

(c) The commissioner shall make an annual public report of the aforementioned assessment results. Such report shall include, but not be limited to, a report of the assessment results by grade and subject area for each school district and the state, with an analysis and recommendations concerning the costs and differential effectiveness of instructional programs.

(d) The school board of each district shall by the 1973-74 school year make an annual public report of the aforementioned assessment results which shall include pupil assessment by grade and subject area for each school in the district. A copy of the district's public report shall be filed with the commissioner of education.

(e) The commissioner, with approval of the state board of education, shall by the 1973-74 school year, develop accreditation standards based upon the attainment of the established educational objectives.

(4) Implementation.--This section shall apply to the subject area of reading by the 1971-72 school year and the subject areas of writing and mathematics by the 1972-73 school year. No other subject area shall be tested until assessment in the subject areas of reading, writing, and mathematics has been implemented. Such implementation shall include the testing of all third and sixth graders in the state by the 1974-75 school year and of all third through sixth grade students by the 1975-76 school year in the basic areas of reading, writing and mathematics. An interpretation of such test in each school shall be reported in the annual report of school progress.

An understanding of how this law has been implemented begins with a booklet entitled "Goals for Education in Florida" put out by the Department of Education. The booklet lists ten goal "areas" the first of which is Communication and Learning Skills. The first subsection in this area provides (p. 6):

> a. All students shall achieve a working knowledge of reading, writing, speaking and arithmetic during the elementary school years, accompanied by gradual progress into the broader fields of mathematics, natural science, language arts and the humanities.

The educational assessment to date touches upon only this one sub-goal. The legislature recently made sure that this would be the case for some time to come by amending section (4) of the act to read:

> This section shall apply to the subject area of reading by the 1971-72 school year and the subject areas of writing and mathematics by the 1972-73 school year. No other subject area shall be tested until assessment in the subject areas of reading, writing, and mathematics has been implemented. Such implementation shall include the testing of all third and sixth graders in the state by the 1974-75 school year and of all third through sixth grade students by the 1975-76 school year in the basic areas of reading, writing and mathematics. An interpretation of such test in each school shall be reported in the annual report of school progress.

Since the law mandated that at least in part the assessment be carried out with criterion-referenced tests, the first step was to develop a set of objectives which were to be tested. This was done by contracting in 1971 with the Dade County Public Schools, Broward County Public Schools and Florida State University for them to develop testable objectives in the areas: mathematics, writing and reading, respectively. The work was overseen by the department of education. An important consequence of this initial involvement of school districts is that the claim could not be made that the state was imposing objectives upon the local districts.

From the long lists of objectives developed under contract, it was necessary to select objectives which were to be given priority in the testing program. Once again local districts were involved; they were polled to determine which objectives they considered to be the most important. Committees in each district were to do the work of ranking and it was recommended that each committee include teachers, administrators, curriculum specialists, parents, students and other interested parties. The responses from the districts were tabulated taking into account the size of the districts in weighting their votes. From the ranked objectives the department of education selected the objectives which would be tested. This set of 530 objectives was given to the state board for approval. Since that time, an effort has been made to reduce the number of objectives to be tested, thus for the 1973-74 assessment effort, for example, the number of objectives per subject for the third grade was reduced from 160 to 82. The process for reducing the number of objectives was also a cooperative effort between the local districts and department of education.

It would be useful at this point to indicate the nature of these

objectives. Under the general heading Decoding Skills, the first objective in the sub-section entitled A. Vowels is as follows: Given an example of a word containing the /ā/ sound spelled a as in "baby," the learner will identify words containing the /ā/ sound. (Department of Education, Division of Elementary and Secondary Education, "1973-74 Priority Objectives for Communication Skills (Reading and Writing) and Mathematics in Florida, Grade 3.)

Test items were also developed to test each of the 530 objectives in 1972-73 and the lesser number in subsequent years. Again the local districts and university were involved. Their work was then submitted to Harcourt Brace Jovanovich, Inc. for review and revision. This review resulted not only in the development of the final test items but also the identification of those objectives which could not be tested. The following table shows the number of test items used for each subject and form.

Table 1. Number of items used for each subject and form

Subject	Form 1	Form 2	Form 3	Total per Subject
Grade 3				
Math	59	70	63	192
Reading	30	35	45	110
Writing	9	24	24	57
Total number per form	98	129	132	
Grade 6				
Math	71	67	70	208
Reading	56	86	68	210
Writing	33	36	41	110
Total number per form	160	189	179	
Grade 9				
Math	59	75	62	196
Reading	27	55	70	152
Writing	56	36	34	124
Total number per form	142	166	166	

It might be noted here that Florida plans to develop and is in the process of developing a bank of test items for each objective; hence stored on magnetic tape will be up to ten test items per objective from which will be selected a smaller number for use each year. That way, over a period of years the likelihood of the same set of test items appearing on a given test for testing a particular objective is very slight.

Putting that aside, it can already be seen that bits of information to be collected with the tests was and does amount to an enormous quantity. Hundreds of objectives to be tested with a total of 720 test items.

The problem of an enormous quantity of data is further compounded when the size of the population to be tested is taken into account. In 1972-73 a sample of almost 55,000 students in grades three, six, and nine participated in the assessment. In 1973-74 the figure jumped to 112,000 students. The 1974-75 assessment involved 360,000 pupils and the figure will go even higher when the legislative mandate is carried out that every student in grades three through six be assessed in 1975-76.

Even if not every student is tested with every test item used to assess a given objective, and even if the number of objectives (and

accordingly the number of test items) has been reduced over the years, the bits of information to be collected each year is staggering. And then if the results of one year is to be compared with the results of preceding years, the amount of data to be analyzed in any given year simply become overwhelming.

To make matters even worse there will be no way to provide a meaningful analysis of these data insofar as relating student achievement to student background factors -- the factors which all previous research has shown is the most important explanatory variable for student achievement (James S. Coleman, et al, Equality of Educational Opportunity, Washington, D. C.: U.S. Department of Health, Education and Welfare, 1966) This is so because very limited demographic data are to be collected. Only the student's age, sex, race, whether the student understands spoken English, is a special education pupil or is a migrant student will be collected. There will be no information on the family's income, parent's education, parents' occupation, educational facilities in the home -- books, television, etc. (This information was not and will not be collected because it is deemed to be too sensitive and obtaining such information from the children was considered not a reliable method of collection.) While information about the schools in which the students are enrolled will be available through another information collection system, discussed below, running correlations between this information and student achievement would make no sense without also being able to hold constant the demographic information the state is not collecting.

How then will the results of the testing be analyzed and reported? What use can this information be put? What impact will it have upon the curriculum of the public schools?

The data will be reported each year by state, district and school building. But comparisons between districts or school buildings will be extremely difficult to make. This is so because of the format of the reports, and the problems inherent in interpreting the data which are reported. A sample of how state and district results are to be reported follows: Everyone of the hundreds of objectives are listed in the table. Next to each objective is listed data describing the state-wide results and the data for the particular district being compared with the state averages. The data reported for the state includes, first, percent of students, state-wide, who achieved the objective. Apart from the problems of projecting from a sample population to the whole population the number of students who would have achieved the objective if all students had been tested, this percentage figure involves a normative judgment by professional educators. It will be noted that each objective is tested with <u>at least four</u> test items. How many test items have to be successfully completed in order for a student taking the test to be deemed to have mastered the objective is a determination made by professionals at the department of education. Students are now being compared against what professional educators think they should be able to do instead of simply against each other. One norm has been substituted for another norm.

After the percent of students state-wide who achieved the objective is listed, comes the standard error and then the "range for the state score" which is a function of the standard error. Hence if the percent who achieved the objective was 95.5, and the standard error was 0.3, then the range for the score was between 95.0 and 96.1. In other words the actual percent of students who achieved the objective probably fell between 95.0 and 96.1 with the best

guess being the first figure of 95.5.

On that same line with the state data is the district data for the same objective: percent who achieved in the district, standard error, range for the district. The final figure for that objective is called the "overlap of ranges." In this column is marked either nothing, i.e., the space is blank, or a plus (+) or a minus (-) appears. What these signs do is to provide a guide to the extent to which the "range for the state score" and the "range for the district" score overlap. Hence if the state range is 95.0 to 96.1 and the district range is 93.2 and 97.2, there is a clear and strong overlap of the two ranges. The state and the district had as possible common percentages of achievement scores between 95 and 96.1, thus no difference in the achievement between the state and district can be assumed: the column will remain blank. If the column is marked with a plus then the strong possibility exists that the district had a higher percent of achievement on that objective than the state and vice versa if the column is marked with a minus.

These figures are repeated for every objective tested in the assessment. And no overall final summary comparison is provided between the state-wide results and district results. A district which wanted to compare itself with the state would simply have to compare objective by objective. No guides are provided as to whether, overall, the district is doing better or worse than the state-wide student population. Thus if third grade students in Dade County seemed to do worse on 22 reading objectives out of the approximately 120 objectives tested, the district would have to decide for itself whether overall it was doing better or worse than the state-wide population. Aside from the problems of interpreting the data discussed

below, the district would have to decide if the 22/objectives on which the district received a minus sign in the last column were very important or trivial objectives. The reported results, thus are only a starting point for making any kind of comparison.

Before turning to other problems of interpretation it might be noted that comparison between school buildings and/that the overall district performance on each objective is reported in the same way as the comparison between state-wide and district performance. Each objective is listed and next to it is reported the same kind of figures now for the district as a whole and the school building in question. Again no overall summary comparison is made between the building performance and district-wide performance.

A final table provides a handy method for making comparisons between school buildings and district results on each objective. Thus, down the far left hand column is listed each school building in the district. Across the top of the table the objectives are listed by identifying number. The matrix which is formed thus gives one the opportunity to see how every building did on objective 9C-21, reading down the columns, or by reading across the table one can see how building no. 680901 did on objective 9C-21, 9C-22, etc. The last figure in the vertical columns gives the district percent of achievement for that objective. A plus, minus or blank next to the figure for the school percent of achievement on a given objective provides the same information as discussed above.

It is important now to note what the state itself says about how these data are to be interpreted. As for using the data to compare between district and state achievement, or between building and district achievement, the state warns that in essence the comparisons simply cannot be made validly.

There are, the state says, at least three reasons why the district or building might be doing better, worse or the same as the state and district, respectively. (Florida Department of Education "Guide to District and School Assessment Results, 1973-74," pp. 2-3):

> 1. Instructional Priorities. The district or school may have placed its primary emphasis on the development of certain math skills, so scoring below the state in reading and writing would be less significant, as long as the math scores show some success in meeting the goals set for that area.
>
> 2. Instructional Schedules. A decision by the school to schedule instruction in certain objectives in the latter part of the school year -- after students have been assessed -- could account for poor scores on those objectives.
>
> 3. Socio-economic Level. Some schools have a student population that is comprised mainly of disadvantaged students, causing their scores to be lower than those of schools with an upper-class pupil population.

As if these problems were not sufficient to put any one off from using the data for comparison purposes that state department adds the following (p. 7):

> All too often there is a tendency to count the +'s and -'s without analyzing the size or importance of the difference. A + or - indicates that there is likely a statistical difference between district and state performance, but it does not identify "educational significance." Thus, a + beside a district score of 57 when the state score is 51 does not mean that the district is "doing well," nor does a - for a district score of 64 when the state percentage is 71 mean that the district instructional program is inadequate. Either interpretation might be valid, based on an analysis by district personnel of their instructional goals and programs, but the + and - do not provide that interpretation.

If the data cannot be used for making comparisons, what then is it useful for? The department of education offers the following suggestion. Each district should set its own goals for each objective and the data from the assessment program can show the district how the district as a whole or a particular building is progressing toward that goal over the years. Thus movement from a percent of achievement from 93.9 to 95.5 might indicate

improvement in the achievement of that goal. But even using the data this way involves significant problems. The department of education itself notes that differences of less than five points should not concern the district as such a difference might simply be caused by the different testing procedures being used from year to year. (p. 9) Changes in the instructional schedule can cause a change in the scores. Perhaps more important, changes in the socio-economic make-up of a particular school building or the district as a whole can be the cause. And it must be remembered that it was state department professionals who determined how many test items must be successfully completed in order for a given student to have been deemed to have scored "right" or "wrong" on that objective. Hence, the district in even using these figures is accepting the judgment of the department of education as to what should be expected of students on a given objective -- a judgment which, if the district examined it, might not be acceptable.

In brief it is not clear how the data can be used profitably by either the state or local districts. It certainly is not clear that the legislature has realized an educational accountability system when it enacted "The Educational Accountability Act of 1971." In other words, it is doubtful the information collected under this state-wide assessment system can be legitimately used to hold any district or school building accountable for its performance. There are too many ways in which the data can be attacked and, in any event, the results are so cumbersome to use that they are simply going to be reported out and then probably ignored or used incorrectly.

This last point needs some elaboration and brings us to the impact this system will have upon the curriculum in the public schools. All those interviewed in Florida agreed that the assessment effort already had and

would continue to have an effect upon the curriculum in the public schools. There are three possible ways this could be true. Either the local districts are being very sophisticated in using the data by supplementing the information they obtain from the state with data they have collected on student background factors, with a careful judgment as to which objectives are most important to that district, with a judgment as to how many test items must be completed successfully in order to score the performance on the objective right or wrong, and with information about the school programs to which the students were exposed. If the districts are doing all this, then perhaps the data might be used correctly, but there are no indications that any district is doing any such thing. The second possibility is that the districts are taking the data and using it to make decisions while ignoring all the pitfalls in the use of the data outlined above. There is some indication that this may be happening.

The third possibility seems to be the most important. Simply because the state in cooperation with local districts has established a catalog of objectives of the basic skills which are to be tested, the political process at the local and state levels has begun to be concerned with student achievement, with educational outputs instead of simply with inputs. And more specifically, the testing system has focused professional and lay attention upon the problem of student achievement in the basic skills. A concern with such achievement was, of course, one of the reasons the whole accountability system was put in place in the first place. But now that it is in place, the system itself keeps that concern at the forefront of public and professional attention.

Dade County has reacted to this "pressure" in the following way. It

has gone one step beyond that state reports to create a "profile" of each student showing how that student did on the assessment, on each objective. The district itself has developed its own test items to check up on its pupils between state assessments. Materials have been prepared and are being prepared to teach toward those objectives, and teachers are being encouraged to teach from these special packages of materials.

Others interviewed see the primary value of the assessment process as establishing a concern with more rational management of the educational system. At least now administrators are beginning to feel as though they should operate the educational system in terms of output objectives and a dialogue has been started on this problem. The issue of management by objectives has been placed on the public political agenda. And most commentators say that the general effect of the assessment is large, massive and the most significant force in the state today for influencing the curriculum.

B. Accreditation

Related to the assessment effort is the massive and complex state established accreditation process. Authority for the department insisting that schools go through an accreditation process is based on Section 229.802 which provides:

> The department shall examine the school plant, personnel, instruction, schools, methods of keeping accounts, records and reports and other aspects of district school systems and educational institutions; to make recommendations to the proper authorities for needed changes and improvements; and to classify or accredit schools or services on the basis of standards and regulations prescribed by the state board.

Accreditation takes place in terms of three types of standards: input standards, e.g., teacher-pupil ratios; process standards which specify

action of the staff in implementing the educational program, e.g., The program provides opportunitities for students to express ideas and feelings through music; and product standards, e.g., students experiment with a number of musical instruments, creating simple melodies of their own. The three levels of compliance for each standard -- and there are hundreds of these standards -- is specified, thus a district might be rated on a given standard at level 1, 2, or 3. The standards were once again developed by the department of education in collaboration with the local districts in the state. The input standards are fairly specific and local districts have no discretion in redefining these standards. The districts are simply expected to evaluate themselves in terms of the standard as given. However, the process and product standards are only loosely established by the state, e.g., the state booklet lists the following standard: Space utilization has been evaluated annually by use of an analysis chart and necessary adjustments have been made. It is up to the district to recast this standard as suits the districts desire, e.g., The principal will evaluate on an annual basis the instructional spaces needed by the school. Compliance will be indicated by 90% of the classes being taught in spaces of sufficient size and design to carry out the identified goals of each subject and service area. Product standards are similarly for the district to define for itself. Furthermore, a district in seeking its "grade" or "ranking" may choose to be evaluated and to evaluate itself in terms of the input standard and either the process standards or product standards. Hence any district might be rated only in terms of two or the three standards. Twelve districts have chosen to be accredited in terms of all three standards.

What is clear from this brief description of the accrediting arrangement

is that almost no district can fail to be accredited and accreditated at a high rating. First, the districts can choose between product and process standard, and secondly each district can define for itself how tough a version of the literally hundreds of standards it wants to rate itself against. It is possible for a district to establish such a low standard(s) that it cannot fail to meet the standard(s).

The state assessment effort ties into the accreditation process in the following way. Normally data for determining a school's accreditation is collected through forms which the district must fill out for the state annually, and through a self-assessment process coupled with a state inspection every five years. Now with the availability of state assessment data, these data will be used to determine if the district has met its own product standards which it has set for itself. Thus, instead of the district devising its own tests to determine if its own goals are being met, the state assessment tests will be the basis for determining if the district has met its own self-imposed objectives. Naturally since the state assessment tests are directed to the objectives approved by the state board, the district will in effect be forced to use those objectives as the basis of its instructional program in the grades to be tested. But, to stress the point again, while the state objectives are to be used, it is up to the district to determine to what extent it wants its students to be successful in achieving those objectives for accreditation purposes.

Finally, it might be noted that no state imposed consequences hinge upon achieving a high or low ranking in the accreditation process. State money is never increased or reduced depending on how a district comes out in the accreditation process. In fact it would be possible for a district

to refuse to go through the process, but no district has done so. Thus, it is not entirely clear why the state department has mounted this complex, massive, time consuming and expensive process. Local districts generally find it an annoyance with which they must go along simply for fear of the bad publicity that would accompany a refusal to comply.

The implications of this process for the school curriculum are subtle and indirect. The entire effort reinforces the idea that educational planning should take place in terms of measurable objectives -- objectives that compliance with which can be determined in quantitative terms, punched out on punched cards and run through a computer. Further, even though the state does not impose specific process and product standards on the local districts; it does provide very general versions of these standards that inevitably focus the attention and shape the standards actually adopted by the district for its self-evaluation effort. It is probably easier for many districts to work from the standards laid out by the state in five booklets totaling about 260 pages of lists of standards. Hence the accreditation process is another indirect and inefficient way in which the state shapes the curriculum of the local districts.

C. Comprehensive Information and Assessment System

Another mechanism by which the state will be able to collect still more information was established by Section 237.34 adopted in the 1973 legislative session. The provision provides:

> By July 1, 1974, the commissioner shall develop plans for the design and implementation of a comprehensive management information and assessment system. These plans may be developed using contracted services. Representative districts shall be involved to assure that individual district management information and assessment systems provide output reports

that are compatible with the required input needs of this system. By July 1, 1975, the system shall be in operation in each appropriate division of the department, and a compatible system shall be in operation in each district. The commissioner shall report on the progress of implementing the system to the governor, the state board, and the legislature prior to the beginning of the regular 1974 and 1975 legislative sessions. The state system and the compatible district systems shall provide for at least the following:

(a) Determination of the management decisions which will be made at each educational level and the information needed at each level; however, the primary unit for information and assessment shall be the individual school.

(b) Standarization of reporting definitions and terms.

(c) Procedures for assuring the compatibility of management objectives at the department, division, and district levels necessary to implement public education policy.

(d) Procedures for assuring comparability between student performance information collected and reported by this system and national indicators of student performance.

(e) Compilations of relevant standardized fiscal,student, program, personnel, facility, and community information in forms usable at various management and policy-making levels.

(f) Integration of all present information components of the appropriate divisions of the department into the comprehensive system, which shall include, at least, such present educational information components as accreditation, student assessment, school house facilities, and cost accounting.

(g) Procedures for collection and dissemination of collected educational information required by other state agencies and federal agencies.

(h) Procedures for a continuous review of all components of the information system to assure that information collected is necessary, adequate, and reliable and that it is processed in an efficient manner.

(i) Wherever possible, a reduction in the number and complexity of required reports, particularly at the school level.

(2) COST ACCOUNTING.--Each district shall account for expenditures of all state, local and federal funds on a school-by-school and a district-aggregate basis in accordance with standards established by the department or as provided by law. The method used by each district when recording and reporting cost data by program shall be reviewed and approved by the department in accordance with regulations prescribed by the state board.

(3) COST REPORTING.--Each district shall report expenditures of all funds on a school-by-school and on an aggregate-district basis in accordance

with standards provided by the department. Definitions of program categories and cost elements to be reported shall be prescribed by regulations of the state board and shall include the programs set forth in §236.081(1)(c), Florida Statutes. In the 1974-75 fiscal year each district shall report to the department of education the percent and dollar amount of current operating funds of the Florida education finance program exclusive of categorical program funds and funds expended in the manner prescribed by Section 236.081(4) expended by program cost categories that generate the funds. By the 1975-76 fiscal year, an amount equal to at least seventy percent (70%) of current operation funds of the Florida education finance program exclusive of categorical program funds and funds expended in the manner prescribed by Section 236.081(4), Florida Statutes, shall be expended by program cost categories in the district that generates the funds and the school shall report similar expenditures and percents for basic programs. By the 1976-77 fiscal year, eighty percent (80%) of current operation funds of the Florida education finance program shall be expended by basic program cost categories in each school that generates the funds and by special program cost categories in the district that generates the funds. A district by district accounting shall be made for all categorical programs identified in §236.081(6), and such funds shall be expended for the costs of the identified programs in accordance with regulations of the state board. All districts, in cooperation with the department, shall plan mutually compatible programs for the refinement of cost data and improvement of the accounting and reporting system. The department shall report to the legislature sixty (60) days prior to the opening of the regular 1975 and 1976 sessions on the status of district programs and the state's own program for improvement of accounting and reporting of cost data on a statewide compatible basis. The report shall include the anticipated degree of implementation in the current fiscal year. The refinements and improvements identified in the district's plan and the state plan shall be accomplished by July 4, 1976. Each approved district plan and the state plan shall incorporate procedures or the alternatives considered for minimizing the number and complexity of reports from the school level.

The most significant result of this new act is that for the first time the state will be able to obtain within-district comparisons of the amount of money spent in each school building. This capability opens the door to establishing prima facie cases of discrimination as well as providing the state to determine the extent to which the statutory requirement that "By the 1976-77 fiscal year, eighty percent (80%) of current operation funds of the Florida educational finance program shall be expanded by basic program cost categories in each school that generates the funds and by special program cost categories in the district that generates the funds." (Chap. 74-227), Section 237.34) Hence the importance of authority to collect information cannot be understated: without this authority and the capacity to do so the state would not be able to enforce its own priorities for how money

should be spent on the school program. The legislature has made more possible the realization of its own educational program goals.

(D) Textbook Selection

Florida requires state approval of textbook and other materials before it may be used by local districts. This textbook selection process was recently investigated by the state Senate Committee on Education when complaints came to the legislature from local districts that the state consistently ignored the suggestions of the local districts as to which books should be approved by the state for local use even though many districts wanted the books requested. The investigation revealed many abuses in the textbook selection practices of the state. Secret non-public contracts were made. The books selected were not learner verified and selections were made before the price of the book was known. The agendas of the meetings of the state textbook council were not published and notices of meetings were not being sent, and at the meetings the agendas were ignored. Possible serious problems of conflict of interest were uncovered. To make matters even more suspicious, all records of the book selection process had been destroyed in violation of Florida law that public records not be destroyed for at least two years. (Interview with Jack Leppert, Staff Director, Senate Committee on Education.) The investigation resulted in a revision of the textbook selection law.

The newly revised textbook selection law is designed to correct these abuses, to make the process a more collaborative effort between the state and local districts, to give the very large districts a greater voice in the textbook selection process, and to provide certain guidelines as to which book may not be selected. These points are illustrated below.

An important revision of the law so as to broaden its scope beyond

textbooks, drops the term "textbook" and uses instead the term "instructional materials". The term "instructional materials" is defined (Chapter 74-337, Section 233.07):

> For purposes of this chapter, instructional materials are defined as items that by design serve as a major tool for assisting in the instruction of a subject, course, or activity. These items may be available in bound, unbound, kit, or package form, and may consist of hard or softback textbooks, consumables, learning laboratories, slides, films and film strips, recordings, manipulatives, and other commonly accepted instructional tools.

Final selection of instructional materials rests in the department of education which must choose from materials recommended to it by state instructional materials councils. These councils in turn must consider the recommendations of local district instructional materials council. (FSL 233.07 as amended by Chapter 74-337) The department of education, state instructional material councils and local council work with imposed procedural and substantive requirements which are likely to affect the choices ultimately made. Once the materials have been selected and approved districts may still ignore the list, and purchase their own materials but must do so with local funds; Section 233.34 permits only 25% of state funds for instructional materials to be used for materials not on the state list. In brief, the basic constraint on local districts with regard to using only state approved materials is a financial constraint. (FSL 233.34 as amended by Chapter 74-337).

We turn now to some of the details of the selection process insofar as they bear upon the likely outcome of that process, that is, upon the nature of the materials approved for purchase with state supplied funds. The process begins with the appointment by the commissioner of a state instructional materials council. The law provides "There shall be councils

for the recommendation of instructional materials for the elementary and secondary grades as may be necessary and recommended by the commissioner of education ..." (FSL 233.07 (1) as amended by Chapter 74-337) Hence there may be councils of elementary science, social studies, or even limited to first grade reading, etc. The councils are to consist of nine members serving staggered terms of three years, and shall be made up of four classroom teachers, two lay persons, one school board member, and two supervisors of teachers. No school district may have more than one representative on a council.

These provisions dealing with the make-up of the councils are all new revisions of the statute reflecting an attempt to assure wide participation of many sorts of people with heavy emphasis upon local involvement in the process.

In adopting recommendations perhaps the most important constraint on the council is the requirement that the decision shall be based on the "desires of the districts." (FSL 233.07 as amended by Chapter 74-337) This provision is supplemented by the following (FSL 233.09(4)(F) as amended by Chapter 74-337.):

> When recommending instructional materials for use in the schools each council shall have the recommendation of all districts which submit evaluations on more than half the materials submitted for adoption in that particular subject area aggregated and presented to the members to aid them in the selection process; provided, however that such aggregation shall be weighted in accordance with the full time equivalent student percentage of each district; and provided further, that, that no instructional materials shall be evaluated or recommended for adoption unless each of the district councils shall have been loaned the specified number of samples.

What this provision does then is to enlarge the voice of the larger school districts such as Dade County which are actively engaged, with large

curriculum departments, in evaluating curriculum materials. Thus, an element of participation is accorded these large counties which they did not enjoy before the law was revised. Further, the smaller and "less sophisticated" and more rural counties may find that they will have imposed upon them lists of materials which reflect the preferences of these larger counties which are generally more active in the process of selecting materials. This result is in keeping with the thinking of the drafters of the new law who do not believe that some of the smaller county school districts are fully competent to select curriculum materials. In short, the revised instructional materials selection law attempts to achieve two goals: greater local involvement while at the same time avoiding the consequences of letting some of the smaller, more rural districts select their own materials.

Other provisions which are to guide the state councils include such a criterion as that the books must "accurately portray the cultural and racial diversity of our society, including men and women in professional, vocational and executive roles, and the role and contributions of the entrepreneur and labor in the total development of Florida and the United States." (FSL Section 233.09(4)(a) as amended by Chapter 74-337) This requirement can be coupled with the restriction that "No instructional materials shall be recommended by any council for use in the schools which, in its determination, contains any matter reflecting unfairly upon persons because of their race, color, creed, national origin, ancestry, sex, or occupation." The phrase "in its determination", it might be noted, may preclude use of this provision as a basis for challenging in the courts the selection of state materials on the ground, for example, of an unfair representation of people because of their

sex. The statute seems to commit the decision on this question to the discretion of the council and ultimately the department of education. Of course, courts have been known to work around such restrictions, hence challenges to the adoption of certain books on the basis of this restriction may nevertheless prove to be possible.

Another statutory guide requires that the council be satisfied the materials are accurate, objective, and current and suited to the needs and comprehension of pupils for which the materials were selected. (Section 233.09(4)(e) as amended by Chapter 74-337.) This provision should be read in connection with Section 233.25 (3)(b) as amended by Chapter 74-337. That provision requires that the publisher submit "proof of the use of the learner verification and revision process during prepublication development and post-publication revision of the materials in question." The section goes on to define learner verification as the "empirical process of data gathering and analysis by which a publisher of a curriculum material has improved the instructional effectiveness of that product before it reaches the market and then continues to gather data from learners in order to improve the quality and reliability of that material during its full market life." If such information is not provided, the section requires the publisher must satisfy the council that it will gather and use learner verification data to revise the materials. The section continues to define learner verification as including:

> ...data gathered directly from learners and that data may include the results of criterion-referenced and group-normed tests, direct learner comments, or information gather from written questionnaires from individual or small group interviews, and not precluding the use of secondary data gathered from teachers, supervisors, parents, and all appropriate participants and observers of the teaching-learning process.

There are many problems associated with this effort on the part of the state to obtain cost-effective materials. First, because there are so many variables which enter into whether and how much and how fast a student learns (e.g., such background variables beyond the control of the schools as family social-economic status; and such variables as the enthusiasm of the teacher for his job), it is not clear that research will be able to lead toward the development of materials which are scientifically proven to be the cause of more effective learning by students than other materials. Secondly, the statute is so general that almost any piece of inadequate research might serve to meet the requirements of the statute. Third, it is likely publishers will use methods of research which show off their product to best advantage, as a result different publishers will use different methods of establishing the worth of their materials. Hence it is not at all clear that it will be possible to make comparisons between the research results of one publisher and another. Fourth, undoubtedly this requirement will drive up the cost of purchasing textbooks while not providing the state with any clear benefits. Further, the larger publishers will be able to mount seemingly large and impressive learner verification projects which smaller publishers could not hope to mount. The law in question thus stacks the odds against the smaller publisher getting his materials accepted at a time when it is not at all clear that the product of the smaller publisher is necessarily of lesser quality. In brief, there are grave doubts that the learner verification requirement will provide the instructional selection councils any better basis for selecting materials, but it does seem clear this provision will drive up the cost of these materials.

Section 233.09 also provides that the state instructional materials

council, in addition to relying upon statements of the publishers, may conduct or cause to be conducted its own investigation as to the compliance of the materials with the requirements of the other provisions of the law. Those other privisions have been listed above but also include such further criteria that the materials accurately portray man's place in ecological systems, the need to protect the environment, and the effects on humans of various stimulants, as well as controlled and dangerous substances. And it might be noted that a criterion for selection which was removed from the statute books was one which forbade the selection of textbooks which treat subjects in a partisan manner, or editorialize or propagandize communistic philosophy or other principles inimical to the U.S. government, and that books should be selected which provide students with the traditional ideals and basic concepts of American Democracy. (FSL 2330.09 (5)(b) as amended by Chapter 74-337).

As was noted, among the pieces of information the state instructional materials councils must use are the recommendations from the district instructional materials councils. What those local councils recommend must be made part of the official and public record of the state council. Indeed, all state council motions, votes, and summaries of debates are to be placed in a public record available for public inspection and duplication. The state council must file a public report with the department of education. And all these materials are to be the product of meetings which have been publically announced at least two weeks prior to convening and which are open to the public. All in all the public nature of this process will make it even more difficult to ignore the recommendations of the local instructional materials councils. (FSL Section 233.09(1), (2), (5).)

The local instructional materials councils must also conform in their make-up to certain statutory requirements. If the council consists of five people, two are to be lay persons and three must be teachers. If the local council is made up of six or more people, at least one-third of the membership must be lay people, and one-half teachers. Procedurally the local councils may not deny any publisher or manufacturer time equal to that time given any other publisher to present his product. The local councils are to follow the same substantive guidelines as apply to the state council, for example, that dealing with unfair representation of people because of their race. And recommendations are to be made by ranking the materials in order of preference. (FSL Section 233.09(3)(c), as amended by Chapter 74-337.)

These procedures required of the local councils once again favor the larger and more active school districts. Particularly the requirement that once a local district has established a local council it may not refuse any publisher a chance to present his materials. Obviously a requirement of this sort forces the local district into a long, complicated and time consuming evaluation process. Only the larger districts with sufficient money and staff to engage in this kind of process would be inclined even to start the process.

Once the local and state councils have decided, the department of education asks for bids from the recommended publishers. Thus, in making the final selection the department "shall give due consideration both to the prices bid for furnishing books and to the report and recommendations of the state instructional materials textbook council." (FSL 233.16(1).) Once again a public report must be filled.

Most of the points outlined in this review of the state instructional materials selection law are new to the statute books. It remains to be seen what effect these laws actually have upon the politics of the selection process, but it does seem that one effect that cannot be avoided is the greater impact the larger, more prosperous and active county districts will have upon the selection process. Once again then, we see a new statutory revision which has shifted authority and power in the state. This time to the local level and more specifically to local board level as opposed to the principal at the building level. At the same time the law also expanded the options at the local level in another way: By expanding the scope of the act from just textbooks to instructional materials, the legislature increased the number of items for which state aid could be given. The next move on the part of districts such as Dade County is to seek an amendment of that section of the law which permits only to 25% of the state funds to be spent on items not approved by the state. The desire now is to change that figure to 30% thereby further increasing local discretion. It is ironical that, for example, Dade County would be one of the districts pressing most strongly for such a change when the state textbook law is in many ways already designed to give it a larger voice in the selection of instructional materials than many other smaller counties.

(E) Regulating

A major function of the state board and department of education is the regulation of the local districts through the issuance of regulations which have the force of law. A regulation which has a direct impact upon the curriculum of the public schools is 6A-1.95 which specifies the requirements for high school graduation. By specifying these graduation requirements

the state in effect imposes certain duties upon the local districts to provide these courses: language arts, mathematics, physical education, science, social studies including American history and the Americanism vs. Communism course. Additionally Regulation 6A-6.22 follows up on the statutory requirement that Florida history be taught by specifying the purposes as: (a) Developing proficiency in participatory citizenship; (b) Learning about and considering contemporary and historical political, economic and social development of the State of Florida; and (c) Applying new knowledge about the affairs of the state in the context of community, state, nation and world concerns. Another regulation details the content of driver education course. (Regulation 6A-6.26) In a curious contrast, the state regulations with regard to exceptional children specify nothing about the programs to which they may or must be exposed but largely concentrate upon further defining the different kinds of exceptional children and tackling the problem of the procedures to be followed in classifying pupils. (Regulations 6A-6.30ff)

Finally we might note two other ways in which the state can influence the local program -- (i) through the operation of the various categorical grant programs, e.g., environmental education grants and (ii) through issuing curriculum guides as an aid to the local districts. There was no indication that either of these functions played a major role in shaping the educational program in the public schools.

In brief, the most important way the state board, commissioner and department of education influence the educational program in the state is through the operation of programs that indirectly affect that program rather than by direct specification of courses to be taught or specification

of the course content. The state's influence is most clearly seen in establishing program priorities.

IV. Courts

Access to the courts is discussed at this point because an understanding of the role the courts have played or might play in shaping Florida law is important for the assessment of the scope of local board authority. What the local boards may do is, in other words, importantly conditioned by what the courts might do upon review of a challenged board action.

Access to the courts to redress grievances is specifically guaranteed by the Florida Constitution, Article I, Section 21. A constitutional right of judicial review of agency action, however, does not necessarily assure complainants that the review will be vigorous and intense. Indeed the Supreme Court of Florida has said that this provision does not contemplate that the exercise of legislative or executive authority shall be subject to judicial review only to a limited extent. (Nelson v. Lindsey, 10 So. 2d 131/133 (1942).) (The court said judicial review would only be available to determine if there has been a violation of a constitutional right. Thus it appears in Florida that one only has a constitutional right to seek court review if the case involves a claimed violation of another right protected by the constitution. As we shall see momentarily access to the courts is nevertheless generally available for non-constitutional cases.)

Article 5 of the State Constitution establishes a Supreme Court, District Courts of Appeal and Circuit Courts, all of which have constitutional authority to issue such writs as mandamus, injunction, and prohibition. (Florida Constitution, Article 5, Sections 4, 5, and 6.) Thus these common law writs represent an important way for seeking review of the constitutionality

of statutes, regulations, and specific actions as well as seeking review as to whether a particular regulation or action was ultra vires, or whether it represented an abuse of discretion.

Two other major vehicles for obtaining review are established by statute: review pursuant to the declaratory judgment act and review pursuant to the newly revised Administrative Procedure Act. (Chap. 74-310.)

Each of these "forms of action" will be briefly discussed. Preliminarily we note that despite the many ways in which one might bring a suit, Florida citizens, at least with regard to educational matters, have not been very litigious. Few cases were found dealing with educational legal issues or with the implications of Florida's adjective law for the role the courts have or might play in the formulation of educational policy and the distribution of authority.

A. Administrative Procedure Act

The new Administrative Procedure Act applies to both the state board of education, department of education and local school districts, certain provisions excepted. The Act establishes that judicial review may be sought for reviewing rule making (which includes statements of policy) "orders" which are a final agency decision which does not have the effect of a rule, and which is not one of the exceptions to the act for which no review may be sought: internal memoranda which do not affect either private interests or important public interests; collective bargaining agreements; budgets; and other internal communications. (Chapter 74-310, Sections 120.51(8), (13); 120.54; 120.56; 120.57; 120.68.)

Before examining the provisions of the ACT insofar as they guide the

exercise of judicial power, it should be noted that the Act provides individuals, whose substantial interests have been affected by agency action, to seek review of the action before the agency itself. Two procedural vehicles are provided for challenging an agency rule: Section 120.54 (3) allows an affected person to seek an agency determination of a proposed rule which does not relate exclusively to organization, practice or procedure (those terms are not defined in the Act). The person seeking review may claim the proposed rule is an invalid exercise of validly delegated legislative authority or that the proposed rule is an exercise of invalidly delegated legislative authority. Section 120.56 allows a person substantially affected by a rule to seek a "declaratory statement" as to the applicability of any statutory provision rule, or order of the agency. Additionally, that person may seek an administrative determination of the validity of any rule (no limitation is provided here as to the kind of rule covered) on the same grounds as stated in Section 120.54(3). But it is important to note that failure to proceed under either Section 120.54(3) or 120.56, by the explicit terms of these provisions, does not constitute a failure to exhaust administrative remedies.

Thus, parties substantially affected by the curriculum policies of the state or local district are statutorily provided a mechanism for seeking administrative review of those policies. Similarly a child aggrieved by his placement in a particular course or program also apparently has the right to seek formal administrative review of that decision. And the duty upon the agency in responding to such petitions is considerable. Rules or orders questioned pursuant to Section 120.56 force the agency to mount proceedings in accordance with a complex set of rules set forth in Section 120.57.

Section 120.57 establishes two basic types of proceedings: formal and informal. The formal proceeding is to be held before a hearing officer appointed by the state department of administration. A transcript is to be made; the parties involved may present evidence and cross-examine and the hearing officer is to write a recommended order consisting of findings of fact, conclusions of law, interpretation of administrative rules, and any other information needed. The agency in its final order may not modify or reject the findings of fact unless it determines from the complete record that they were not based upon competent substantial evidence or the procedures involved in the hearing were faulty. The informal proceeding need not be conducted before a hearing officer and no specific provision is made for cross-examination of witnesses nor for a formal written final order. However, Section 120.59 states that final orders in proceedings which affect substantial interests shall be in writing or stated in the record.

More specifically, Section 120.59 requires that the findings of fact and conclusions of law be separately stated. Additionally, if the ultimate findings of fact are stated in language which merely tracks the statutory language, then the order must also include an explicit statement of the underlying facts of record which support the findings.

Thus, before one goes to court the possibility of seeking review before the agency itself is established. The impact of all these provisions upon the local districts could be considerable. While the statute does not say every request for administrative review of rules and orders must be granted by the agency, certainly the requests of parties substantially affected must be granted. The door has been opened to forcing public hearings on policies

of both the state and local level educational agencies. And these procedures could be of immense importance for children who claim they have been mislabled and misclassified, and placed in the wrong educational program.

Beyond this whether one goes to the agency first or not, the Act provides the opportunity for seeking judicial review in the District Court of Appeal. Several provisions guide the exercise of judicial powers. On questions of law the court must set aside modify or remand the agency action if it is found that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action. If the agency action was found to be "outside the range of discretion delegated to the agency by law; to be inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice if deviation therefrom is not explained by the agency; or to be otherwise in violation of a constitutional or statutory provision" then the case shall be remanded to the agency. As for reviewing any fact found by the agency, the court may not substitute its judgment for that of the agency as to the weight of the evidence on any disputed fact, but may set aside or remand the action if it is found that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record. But the court shall not substitute its judgment for that of the agency on an issue of discretion. (Chapter 74-310, Section 120.68 (9), (10), (12).)

Taken together these provisions point toward a restrained exercise of judicial power, and not toward strict scrutiny of agency action. In the courts at least, then, it is not likely that parents and children will be able to obtain much relief with regard to curricular and placement policies

that involve disputed issues of social science and other facts of more particular relevance to an individual child. The substantial evidence rule embodied in the Act evokes the same kind of judicial deference to agency determination of these matters as found in the federal statute. (cf. Tyll van Geel, "The Right to be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans," 25 Syr. L. R. 863,899 (1974).) And the specific requirement in the Act that the court not substitute its judgment on a matter of discretion will also restrain judicial scrutiny. This will be especially true the more the courts view educational decisions as a matter properly confined to the discretion of experts who clearly know more about the matter than any court could.

B. Declaratory Judgment Act

The legislature has provided for another way of getting into court -- by seeking a declaratory judgment (Florida Civil Practice of Procedure Chapter 86) The act permits a party to seek a declaration of his rights before he has actually sustained an injury or breach of his rights. In pleading he simply has to show whether he is entitled to a declaration of rights, not whether the outcome of the case will be favorable to him. Issues of fact would be handled as under any other action, e.g., if the matter is equitable in nature the court tries the issues of fact. But a declaratory judgment may not be sought that is based on disputed questions of fact alone. It must also involve a question of law including challenges to the constitutionality of statutes, ordinances, and administrative actions. (Henry P. Trawick, Jr., Florida Practice and Procedure, 1974 ed., (Atlanta, Ga.: The Harrison Co. 1974), pp. 615-619.)

C. Common Law Writs

The state constitution establishes the authority of Florida courts to issue a variety of common law writs including certiorari, mandamus, prohibition, and injunction. (Florida Constitution, Article 5, Section 4, 5. and 6.) Certiorari can be used to seek review of quasi-judicial decisions of administrative offices or agencies. (Henry P. Trawick, Jr., op. cit., p. 624) For example, it would appear this would be the appropriate action to seek review of a suspension of a pupil from school pursuant to a hearing held at the district level. Mandamus is used when a party seeks to compel an official to take an affirmative act, e.g., issue a certification to teach. Prohibition is a remedy to prevent any action at all, as is the injunction. All these forms of action may be vehicles for challenging the constitutionality of a statute, regulation, ordinance or administrative action or inaction.

The cases are not particularly revealing as to the significance each type of action might have with regard to the role of the court and the significance of the type of action for the likely outcome of the suit. Only some general comments about these writs are possible. First, it appears to make no difference which writ is used if the case involves a constitutional challenge. However the constitutional issue is raised, the courts end up exercising a scope of review appropriate to all constitutional cases. More specifically, the starting point in all such cases is the strong presumption favoring the constitutionality of the legislation. A constitutionally based challenge to curriculum policy or the placement of students will meet the same judicial resistance.

In non-constitutional cases the type of action does make a difference. Most clearly, courts are resistant to issuing a writ of mandamus unless the

action to be compelled is only ministerial and the petitioner has established a clear duty on the part of the official to perform this nondiscretionary act. (Henry P. Trawick, Jr., op. cit., p. 632) Sometimes this point is put in terms of the reasonableness of the refusal to act: if the official refusal to act is arbitrary and unreasonable then he has a clear duty to act and the court will so order it. (City of Miami Beach v. State ex rel. Lear, 175 So.537 (1937). But cases in which a mandamus is issued because the refusal to act was deemed merely to be unreasonable are rare. In this last cited case officials refused permission to establish a private school in a particular part of town although public schools were permitted in that same area. The court in a mode of analysis like that which would be used in an equal protection case said the refusal to issue permission was arbitrary and unreasonable and "has no relation to the public safety, health, morals, comfort, or general welfare." Continuing it said (p. 539):

> What objectional characteristic touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in a greater degree as to public school has not been suggested, and, we think, for the very good reason that none exists.

Since there are few specific statutes or regulations dealing with the educational program or with how specific children should be handled by the public schools, the writ of mandamus is not likely to prove to be a very useful tool for tackling curriculum issues in Florida. Perhaps the most important area that a mandamus might be used in is with regard to "exceptional children." Section 230.23(4)(m) establishes that programs for exceptional children must be provided by the local district -- usually a matter of considerable expense to a district -- and failure to meet this obligation may best be tackled by a mandamus. Similarly enforcement of

the rule dealing with how state aid must be allocated within the school district, Section 237.34(3), might be accomplished with the use of a writ of mandamus. Also the statutory requirements for how exceptional children must be classified, which are supplemented by state regulations on the same subject, might also be enforced through the same writ. (FSL Section 230.23(4)(m) and Regulation 6A-6.331.) And as more and more specific duties are imposed by the legislature upon the state and local educational agencies, the writ of mandamus may become more useful. But, for the most part, curricular issues are likely to be viewed as discretionary matters with which the courts will not interfere.

D. Appeals to the Department of Education

Teachers who have tenure and who have either been dismissed by a local school board or returned to a non-tenured status may appeal such a decision to the Department of Education through the commissioner of education, (FSL Section 231.36(4).) This provides a means for a teacher who may have been dismissed for reasons related to the curriculum, e.g., refusal of the teacher to teach the prescribed curriculum, to seek a review of such a decision. Indeed under the exhaustion of remedies doctrine aggrieved teachers must exhaust this right of appeal before going to the courts. (The Board of Public Instruction of Taylor County v. The State of Florida, 171 So.2d 209 (1964).)

E. Opinions of the Attorney General

In his capacity as chief legal officer of the state the Attorney General, upon the request of school districts, will render opinions on legal issues of both a constitutional and non-constitutional nature. This provides, at least the local districts, an efficient and inexpensive method for obtaining somewhat authoritative legal advice.

V. Local Districts

A. School Boards

Florida school boards are fiscally independent, have been given basic authority to control the curriculum within their districts subject to specific legislative enactments dealing with the curriculum and state board regulations (FSL Section 230.23(7).):

> The school board, acting as a board, shall exercise all powers and perform all duties listed below: ...
>
> (7) Provide adequate instructional aids for all children as follows in accordance with the requirements of chapter 233.
>
> (a) Adopt courses of study for use in the schools of the district; provided, that such courses shall comprise materials needed to supplement minimum courses of study prescribed by the state board for all schools.

This general authority must of course be read in connection with the more specific directives embodied in Section 233.061 and 230.23(h) and (m), discussed above, which deal with the general program as well as vocational and special education.

In sum, Florida school districts are required to do the following:

a. Provide instruction in

i. essentials of U.S. Constitution
ii. elements of civil government
iii. elementary principles of agriculture
iv. true effects of alcoholic beverages and narcotics
v. kindness to animals
vi. the history of the state
vii. conservation of natural resources
viii. operation of the automobile
ix. evils, dangers and fallacies of communism
x. language arts
xi. mathematics
xii. physical education
xiii. science
xiv. American history or American history and government

b. Provide courses of studies for exceptional children

c. Provide schools, courses, classes in vocational education

The details of how these requirements are to be filled in are left to the local districts. But it must be remembered that in filling in the details the districts must also take into account the assessment program, accreditation, the requirements of the state aid program, and the constraint imposed by the requirement that 75% of textbook aid be spent on state approved instructional materials.

Beyond these constraints, some court cases and opinions of the attorney general provide us with other guides as to the scope of local district authority. Generally speaking if the authority is used in such a way to expand upon educational opportunities, to provide a more varied and richer educational offering, then we can assume that the courts and attorney general would agree with the district's actions. Thus the courts have authorized expenditures for athletic facilities when the statutes did not explicitly so authorize. (Taylor v. Board of Public Instruction of Lafayette Co., 26 So.2d 181 (1946); Scott v. Board of Public Instruction of Alachua Co., 35 So.2d 579 (1948); also see Opinion of the Attorney General 068-90, August 5, 1958; and 041-624, October 27, 1941.)

It might be noted that when school districts have attempted to use their authority to exclude students from educational programs then the Florida courts have scrutinized the scope of the authority more closely. (This is in keeping with the notion that courts will more quickly strike down delegated authority which affects individual rights.) Thus the Attorney General has consistently advised local districts they did not have the authority to exclude married students from the public schools. (Opinions of the Attorney General 072-1 (1972); 059-187 (1959); 052-328 (1952).) And the district court of appeal refused to construe liberally the authority

of a local district to require certified nontenured teachers to take and pass with a certain score the National Teachers' Examination as a requirement for reappointment. (Board of Public Instruction of Dade County v. Dade County Classroom Teachers' Association, 243 So.2d 210 (1971).)

With this background in mind the discussion turns to six issues touching upon the scope of local district authority over the curriculum: (1) Selection of courses; (2) Selection of methods of instruction; (3) Restraints on curriculum innovation; (4) Authority to compel students into courses and programs; (5) Neutrality and indoctrination; (6) Acculturation.

(1) Selection of Courses. As the previous paragraphs indicated the basic public school program is determined by statute and regulation. The question is what discretion is left to the local district in establishing its program: The overall thrust of Florida policy today is to let the districts develop their own programs. There are exceptions to this policy as when the legislature recently enacted the "Free Enterprise and Consumer Education Act" requiring students to take and schools to offer a course that fits the following outline (Chapter 74-173, Section 1 (3).):

> Acknowledging that the free enterprise or competitive economic system exists as the prevailing economic system in the United States, the program shall provide detailed instruction in the day-to-day consumer activities of our society, which instruction may include, but not be limited to, advertising, appliances, banking, budgeting, credit, governmental agencies, guarantees and warranties, home and apartment rental and ownership, insurance, law, medicines, motor vehicles, professional services, savings, securities, and taxes.

Despite this recent enactment the present policy is best reflected in a recommendation of the citizen advisory committee appointed by the governor which recently recommended and got the massive change in the educational finance law: (The Governor's Citizens' Committee on Education, Improving Education in Florida, Tallahassee, Fla., March 15, 1973.)

This policy "hands-off" policy is reflected in the recent repeal of many state regulations. And to the extent regulations remain on the books they provide only the most general guides to the local districts. Thus, for example, one of the few regulations dealing with the content of specific courses merely requires that instruction in the history and government of Florida shall be for the purpose of developing proficiency in participatory citizenship, of learning about and considering the contemporary and historical political, economic and social development of the state and for the purpose of applying new knowledge and skills in developing values and judgments about the affairs of the state, nation and world. (Regulation 6A-6.22)

The statutory code also reflects this sort of flexibility. Section 228.061 permits local districts to offer nursery schools, instruction in applied arts and sciences; programs for rehabilitating atypical, dependent and deliquent children; educational programs for adults; vocational training for people regardless of age and "other types of instruction of a similar nature." Additionally rather than requiring courses in other subjects, the state has followed the strategy of creating categorical aid programs designed to provide assistance to districts that want to offer these courses. Thus there is categorical aid available for programs dealing with the environment, remedial reading, health, bilingual education. (FSL Section 229.8055; 233.055; 233.067; 236.081(7) as amended by

Chapter 74-227) And Section 233.062 gives districts the authority to offer a secular program including but not limited to an objective study of the Bible.

As was the problem in Arizona, no case law was found that sheds any light on how the courts might act if asked to review the action of a school district in offering a particular course or offering a course in a certain way. Presumably the standard of review would be in terms of the reasonableness. or arbitrariness of the policy. If a district failed to offer a program which had been mandated by state law, however, then a mandamus might issue to force the district to fulfill its "ministerial" duty. But in ordering the district to offer the program, for example, for exceptional children, it is doubtful that the court would go beyond this requirement and specify how or in what manner the duty ought to be fulfilled.

(2) Methods of Instruction. In our discussion of New York law the possibility was raised of a court challenge to the efficacy of the methods of instruction -- a challenge which raised the question of whether the program was adequately designed to promote student achievement. The possibility of this challenge rested on the fact that the New York legislature had in a variety of legislative enactments manifested a concern with mounting programs from which "the students may benefit." Thus districts presumably were to work in a decision-making context that forced consideration with such issues and failure to meet the state's concern could be the basis, we speculated, for a court suit.

The decision-making context in Florida is different. Neither the legislature nor the state board has gone so far in any enactment to say that the sort of course, class or program that the district must mount must be one

from which the student may benefit. But the establishment of the state-wide assessment program does move in that direction. To date the legislature has required only that objectives and tests be established to assess the degree of achievement of these objectives. (FSL 229.57 (3) as amended by Chapter 74-205) And although neither the legislature nor state board has directly mandated that any particular level of achievement should be reached, the very step of establishing an assessment process based on measurable objectives does put the state legislature on record as being concerned with student achievement. Additionally the decision to provide extra state aid that may come to a district because of enrolling large numbers of children with low achievement scores, reflects the same legislative concern with student achievement. (FSL 236.081 (2) as amended by Chapter 74-227.)

But while state policy manifests a movement in the direction of requiring districts to provide programs which are effective, the legislature has not yet arrived at that point. Florida law is not yet at the point that one could say the districts have a duty to provide effective programs. Hence, it is doubtful that any suit seeking to require a district to provide a more effective program would succeed. As was stated in the section on the courts, a writ of mandamus will only issue if the petitioner can establish that the public official has a clear duty to perform the act demanded of him.

Florida statutory law does provide a basis, however, for challenging the selection of particular textbooks and other materials. It was noted in the discussion of the state instructional materials selection law that both the state educational department and local districts were to work within certain substantive constraints as to which kinds of materials might be

excepted for approval. For example, instructional materials which contained matter reflecting "unfairly upon persons because of their race, color, creed, national origin, ancestry, sex or occupation," were excluded. Because it is now legislative policy that books of this sort be excluded from use in the public schools -- or at least may not be purchased with state funds -- the possibility exists for a non-constitutional challenge to materials which arguably transgress this limitation.

The main statutory obstacle to such a suit is the phrase in the statute which says in effect that materials which transgress the above rule, in the determination of the state or local council, may not be adopted. (Chapter 74-337, Section 233.09 (4)(e).) A court might read this provision as ousting it of jurisdiction to consider the legality of the choice. Several points from Florida law, however, suggest that the Florida courts may not read the statute in that way. First, the constitution of the state establishes the policy that aggrieved people must have access to the courts. It is at least arguable that a reading of the statute which precluded judicial review would transgress this section of the state constitution. Second, it is state legislative policy that judicial review be available to people substantially affected by the actions of state and local officials. The newly revised Administrative Procedure Act, discussed above, makes this eminently clear. (Chapter 74-310). While it might be argued that the Section 233.09 specifically exempts the selection of instructional materials from judicial review which would normally be available under the Administrative Procedure Act, the phrasing of the Section 233.09 is not strong enough to warrant such a conclusion. If that is the result the legislature had wanted to achieve, it could have done so in plain language. The phrase "in its determination" (which also appears in sub-Section (a) of that same section) is probably meant simply to

fix the responsibility of the councils to make an explicit determination on this point. The phrase may also be a way of saying that deciding this issue is a question for the councils and not for the department of education.

A third reason for thinking the courts would not read the phrase as ousting them of jurisdiction is that it would be contrary to another body of case law mentioned above. Florida courts and the attorney general have been careful about broadly interpreting delegations of authority which may be used in ways to affect important interests and rights of individuals. It would be surprising then if they would now read this provision as delegating to the councils unfettered authority to make a determination that includes important value considerations and will lead to profound psychological effects in the children who are exposed to the materials.

In sum, it would appear that the newly revised state instructional materials law does provide a basis for a court challenge seeking to bar the use of state funds for books which arguably violate the criteria for selection listed in the statute. Whether those same statutory provisions lay a basis for challenging the selection of materials purchased with local funds is another matter. At least the statute lays a premise that state policy prohibits, for example, racially discriminatory materials, and that a district which purchased with its own funds such materials was abusing its discretion if not violating a state statute.

(3) Constraints on Innovation. The topic of innovation is closely related to the two previous topics -- course selection and methods of instruction. To the extent the legislature and state board have specified the courses to be offered and methods of instruction, to that extent innovation is constrained. Of course there are other constraints such as the legislative

determination as to what constitutes a school day, month, and year. In this case a school day is defined as: (228.041(11):

> A school day for any group of pupils is that portion of the day in which school is actually in session and shall comprise not less than five net hours excluding intermissions for all grades above the third; not less than four net hours for the first three grades; and not less than three net hours in kindergarten, or the equivalent as calculated on a weekly basis under regulations of the state board. The minimum length of the school day herein specified may be decreased under regulations of the state board. However, senior high school students who lack three credits or less shall be allowed to attend as a school day that portion of the day necessary to earn needed credits.

The school month is to consist of twenty school days, and the school year of a minimum of 180 school days or the equivalent. (FSL Section 228.041 (14), (17).) Provisions such as these make it more difficult for local districts to offer only three or four hours of schooling to elementary school children on the theory that children do not need lengthy days of formal schooling in order to achieve academically and that it is in fact better for them to spend less time in the classroom. But as the provision quoted above indicates, permission to shorten the school day could still be arranged if the state board so provides in its regulation. Regulation 6A-1.953 provides this option. The school district seeking to operate an experimental or innovative program involving less than the statutorily defined minimum school day, must seek the permission of the commissioner who may grant permission if the program "might contribute to the improvement of the public school of Florida."

State board regulations also allow individual students to work out educational programs for themselves which are different from the basic program required for graduation from high school. Thus, some students may obtain approval to graduate from high school in less than three years in grades

10-12 if they obtain early admission in a post-secondary institution. (Regulation 6A-1,95(2).) Students might also graduate from high school not only by passing certain courses and obtaining a certain amount of credit, but also through "a student performance based promotional plan approved by the school board and commissioner of education." Apparently this means that a student may be tested to determine if he has mastered the materials normally expected of high school students; if he proves he has achieved the objectives he need not take a particular course or courses. (Regulation 6A-1.95(4).) It is also possible for students to obtain credit toward graduation for each 288 hours of successful employment pursuant to an agreement worked out with the school district, parents and student. (Regulation 6A-1.95(3).)

Another provision opens the door to school programs operated outside the school building itself. Thus section 232.022 provides in part that a pupil may only be counted in attendance if he is actually present at school or is away from school on a school day and engaged in an "educational activity which constitutes a part of the school-approved instructional program for the pupil." (See Attorney General Opinion, 56-290, 1956)

The state process for selecting instructional materials for which state funds may be spent obviously places an important constraint on curriculum innovation. A recent amendment of the instructional materials selection law, however, eased the constraint imposed by this law by changing the term of adoption of these instructional materials from five to four years. (FSL Section 233.17 as amended by Chapter 74-337.) And as previously noted some possibility of innovation is allowed for by permitting 25% of the state funds to be used on materials not approved by the state. (FSL Section 233.34 (2) as amended by Chapter 74-337.)

The use of categorical grants as a supplement to regular state aid both frees up the local district and constrains it. On the one hand, grants for health education or environmental education open possibilities that the district may not have been willing or able to fund absent specific state aid. On the other hand, the regulations in connection with those grants constrain the way the money can be used. Thus, in order to obtain money for a driver education course the district must meet a series of requirements as to the number of hours of actual driving experience a student must have and the number of classroom hours of instruction that must be provided. (Regulation 6A-6.26.)

Another body of statutory provisions and regulations taken together underscore the extent the state legislature is committed to educational innovation. Section 230.23(4)(j) authorizes school districts to cooperate with other governmental agencies or with nonprofit corporations for such joint projects or activities as may be authorized by the state board's regulations. Section 229.561 establishes a mechanism whereby local districts can obtain state funds to operate experimental educational projects that may generate useful information for the improvement of educational practices. To this end the statute specifically provides that the commissioner may waive any state board regulation if the district can satisfactorily establish that the regulation inhibits the success of the project. Section 229.801 authorizes local districts in cooperation with the department of education to develop and operate model projects of flexible staff organization.

The theme of allowing districts latitude in the development of their programs is carried through into the laws dealing with teacher certification and employment. Florida, in contrast with New York, appears to have given

its districts a rather free hand in implementing its personnel policies. First, there is no provision in the state constitution of Florida comparable to the provision in the New York constitution requiring that criteria of merit be used for filling all positions. Defining the jobs and job categories and recommending minimum qualifications for jobs is the responsibility of the Superintendent. (FSL Section 230.33 (7)(a).) And the board must act upon the recommendations of the superintendent. (FSL 230.23 (7); 231.36 (4).) If the board rejects a recommendation of the superintendent and instead hires another person it must do so for good cause. Thus, it would appear the boards of education and the superintendents in Florida are fairly free in determining what kind of personnel they will hire. Additional constraints arising out of the certification of teachers will be taken up below.

Before turning to those points, however, it would be useful to underscore the latitude allowed local boards in Florida by quoting from the provision dealing with abolition of positions (FSL Section 231.36(5).):

> Should the school board have to choose from among its personnel who are continuing contracts (i.e., tenured) as to which should be retained, among the criteria to be considered shall be educational qualifications, efficiency, compatibility, character, and capacity to meet the educational needs of the community. Whenever a school board is required to or does consolidate its school program at any given school center by bringing together pupils theretofore assigned to separated schools, the school board may determine on the basis of the foregoing criteria from its own personnel, and any other certificated teachers, which teachers shall be employed for service at this school center, and any teacher no longer needed may be dismissed. The decision shall not be controlled by any previous contractual relationship. In the evaluation of these factors the decision of the school board shall be final.

Undoubtedly this provision was written with the problem of school consolidation as a result of desegregation orders in mind, a fact made most evident by the final sentence which appears to be an attempt to oust the judiciary of any

control over the decision of the school board. Whatever the original purpose of the provision it still stands today and may be used when school districts, faced with financial problems, must consolidate schools or eliminate positions. Thus the provision provides local districts -- subject to constitutional challenges -- with considerable flexibility in abolishing positions, a flexibility often of use to the school board as it tries to reshape its educational program.

The certification system can easily constrain the use to which school districts put their personnel. For example, if a teacher certified in history may not be used to teach art even though the district recognizes in that teacher a particular gift as an art teacher, then that district is severely constrained in the most effective use of its staff. In this respect, Florida, compared to New York, gives its local districts a free hand. Although the basic statutory rule is that no person may teach in the public schools unless that person is certified, neither the statutes nor regulations require that the district use that person only to teach courses for which they are certified. (FSL Section 231.14) Certified teachers may be assigned full time to teach courses they are certified for. Assigning teachers, however, to courses which their certificate does not endorse them to teach, does affect the accreditation of the district. The status standards used as part of the accreditation process call for using teachers only to teach courses for which they are certified. But as we have seen accreditation or the lack thereof carries with it no specific penalities except to the extent it may affect the prestige of the building or school district.

Beyond this problem, the statutes and regulations permit districts to hire people not certified to teach. Section 231.15 provides in pertinent

part: "However, the state board shall adopt regulations authorizing school boards to employ selected noncertified personnel to provide instructional services in the individual's field of speciality." State Board Regulation 6A-1.502 follows up on this requirement by establishing procedural requirements for districts to follow. In any event, because of this provision districts may rather freely call upon and use people in the local community with expert knowledge of skill to provide instructional services in their field of expertise. Thus, a lawyer might be hired to teach a law course; a plumber to teach plumbing.

In the area of vocational education the statutes once again carve out an exception to the usual rule. Teachers and counselors in such programs need not meet the same academic requirements imposed upon teachers of other subjects. (FSL 233.068; 233.0681.)

We thus can conclude that within the broad framework established by the statutes and state regulation discussed in the previous sections, local districts are relatively free of constraints affecting their ability to adopt innovative programs.

(4) Classification of Pupils. The Florida statutory code has left no room for doubt that school districts have the authority to classify pupils. First, the legislature itself has classified pupils as discussed in Section II above. Secondly, several sections refer to the power of the board and superintendent to establish rules and regulations for admitting, classifying, promoting, and graduating pupils. (FSL 230.23(6)(a); 230.33(8)(a).) No cases were found construing the scope of this provision, or revealing what might constitute an abuse of the provision or discussing what procedures must be followed in exercising this authority.

The most important qualification to the above authority appears in section 230.23(4)(m)(4):

> No student shall be given special instruction or services until he is properly classified as an exceptional student. The parent or guardian of an exceptional student placed or denied placement in a program of special education shall be notified promptly of such placement or impending placement or denial. Such notice shall contain a statement informing the parent or guardian that he is entitled to a review of the determination and of the procedures for obtaining such review.

The State Board Regulations implement this provision by requiring that the classification of pupils as exceptional be done by "competent evaluation specialists" such as physicians, psychologists, audiologists and social workers licensed to practice in Florida. Then a staff committee "utilizing the process of reviewing diagnostic, evaluation, educational and social data to recommend educational assignment of exceptional children shall recommend students who are eligible for special programs." These committees are to be made up of instructional personnel, evaluation specialists, parents and community agencies as may be appropriate. Once a child has been classified the parents are to be informed of the classification, the reasons therefore, and to be notified of their due process rights. A parent may seek a review of any placement or denial of a placement. At the review conference the parent may present any factual information related to the classification and may question school personnel about the placement. A decision in writing is to be provided the parent in reasonable time and a final review by the school board may be requested by the parent. The regulations do not specify who is to make the decision at the review conference, whether the parent may bring a lawyer or other advocate, or expert witnesses. What sort of record must be maintained is not specified. There is no indication as to how frequently the classification must be reviewed or whether the parent may seek review of the

classification periodically. In short there are many aspects of pupil classification procedures which are not covered by either the educational law or regulations.

Section 120.57 of Chapter 74-310, the newly revised Administrative Procedure Act, however, may importantly fill in the gaps. The first sentence of this section states: "The provisions of this section shall apply in all proceedings, in which the substantial interests of a party are determined by an agency." The section goes on to say that "formal" proceedings are required whenever there is a disputed issue of material fact. (The features of a formal proceeding were discussed above in Section IV.A.) Since most questions surrounding the classification of pupils involve disputed issues of fact, it appears a parent could force a school district to provide the formal proceeding outlined in this statutory provision.

Whether or not a parent seeks review of the classification by the school district, appeal to the courts is also possible under the Administrative Procedure Act. The statutory constraints under which the court must work are outlined above and indicate that only in the clearest case of misclassification is review likely to result in a court over-turning the local district decision.

Students who are not "exceptional" students are also, of course, subject to the classification practices of the local district. Thus, the district may establish tracks for slower and faster learners. No special procedural protection is provided these students in the educational code or regulations. Similarly, school districts have been given a free hand to shunt married students, and unmarried students who are pregnant and students who previously had a child out of wedlock into "a special class or program better suited to their special needs." (FSL Section 232.01(2).)

The district may establish separate schools, courses and classes for "rehabilitating atypical, dependent, and delinquent children." (FSL Section 228.061(2).) The Florida statutory code does not specify who is an "atypical" child. A dependent child is a child who (Juveniles, Section 39.01(10):

(a) Has been abandoned by his parents or other custodians.

(b) For any reason, is destitute or homeless.

(c) Has not proper parental support, maintenance, care, or guardianship.

(d) Because of the neglect of his parents or other custodians, is deprived of education as required by law, or of medical, psychiatric, psychological, or other care necessary for his well being.

(e) Is living in a condition or environment such as to injure him or endanger his welfare.

(f) Is living in a home which, by reason of the neglect, cruelty, depravity, or other adverse conditions of a parent or other person in whose care the child may be, is an unfit place for him.

(g) Is surrendered to the division of family services or a licensed child-placing agency for purposes of adoption.

A delinquent child is defined by the same section as a child who commits a violation of law, regardless of where the violation occurs, except a child who commits a juvenile traffic offense and whose case has not been transferred to the circuit court by the court having jurisdiction. Presumably the school district may only classify a child as "dependent" or "deliquent" when a court has done so first. There is nothing in the statutory code giving a school district the authority to so classify children. Presumably until the courts act, the school district has the latitude to label the child as "socially maladjusted" thus making the child one of the "exceptional students" who are to be given the special safeguards discussed above. The

regulations define a socially maladjusted child as (State Board of Education Regulation 6A-6.301(7).):

> ...one who continuously exhibits behaviors that do not meet minimum social standards of conduct required in the regular schools and classrooms, whose behaviors are in defiance of school personnel, disrupts the school program and is antagonistic to other students and to the purpose of the school.

What the standards of conduct are to which the student must adhere is within the power of the school board to define. (FSL 230.23(6)(c).)

In sum, Florida school boards use great discretion to control the matching of student with program. Florida, like California, is unique in providing for, through a variety of statutes and regulations, for procedural safeguards in classifying children as exceptional. The clear recognition under the Administrative Procedure Act that all classification decisions are subject to judicial review also sets Florida apart from such states as New York where the legislature has not so forcefully made clear that courts are to review these decisions of the experts exercising discretionary authority.

(5) Neutrality and Indoctrination. The Florida statutory code has left no room for doubt that local districts are to attempt to indoctrinate their students in the virtues of the free-enterprise-competitive economy of the United States "as one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth." At the same time the required course of Americanism vs. Communism is to thoroughly and completely inform students as to "the evils, dangers and fallacies of communism by giving them a thorough understanding of the entire communist movement, including its history, doctrines, objectives and techniques." (FSL Section 233.064.) But interest in such indoctrinating

efforts is lessening. An official in the department of education indicated there was movement to seek the repeal of this provision and recent legislative reforms indicate a movement away from a legislative policy requiring local districts to politically indoctrinate their students.

For example, the recent revision of the instructional materials laws removed the following passage from Section 233.09(5)(b):

> No textbook which treats a subject in a partisan manner shall be included in the list of suitable, usable, and desirable textbooks, it being hereby declared that it is the legislative intent that material in textbooks used in elementary and secondary schools of this state shall not editorialize or propagandize communistic philosophy or other principles inimical to our form of constitutional government, and persons charged with the selection of textbooks should use their best efforts to carry out such legislative intent to effectuate the use of materials which provide all students with the traditional ideals and basic concepts of American democracy.

Some disenchantment with some of the problems of a free enterprise system is reflected in the recently adopted consumer education course.

This course which is premised on the assumption that there exists a "free enterprise or competitive economic system" in the United States, is designed primarily to educate students to cope as consumers with that system. Thus, once again the thrust toward indoctrination into the virtues of the existing political-economic system in the U.S. has been vitiated.

Beyond these statutory provisions there is little law in Florida to guide the local districts as to their authority to take a non-neutral stance on issues of political philosophy and public affairs. No case law was uncovered dealing with this problem just as no cases were found dealing with the teachers' right to make personal statements on these matters in the classroom. On this last point the statutes merely require teachers to teach the essentials of the United States Constitution, flag education, including proper

flag display and flag salute, the elements of civil government. (FSL Section 231.09(1)(a).) And teachers are required to sign an oath that they uphold the constitution. (FSL Section 231.17(1)(b).)

(6) Acculturation. Only one statutory passage has direct bearing upon the authority of the schools to acculturate their students. That section is the one permitting schools to establish special classes for married students, pregnant students or students who have had children out of wedlock. (FSL Section 232.01(c)(2).) This section implies that the school districts may force these students into classes which separate them from other students (they no longer will pose a threat of moral contamination) and which then attempt to instruct them as to their errant ways and provide them with information which may be helpful in coping with their new status.

If a school district offers a health education course, by statute, a parent has the right to seek an exemption for his child from that course (FSL Section 233.067(10).):

> Any child whose parent presents to the school principal a signed statement that the teaching of disease and its symptoms, development and treatment and the use of instructional aids and materials of such subjects, conflicts with his religious beliefs shall be exempt from such instruction. No child so exempt shall be penalized by reason of such exemption.

The next sub-section also adds that when a district does offer a health education program with state aid, that this does not mean the district may be required by the state board to provide sex education as a specific area of instruction. (FSL Section 233.067(11).)

Beyond these provisions the statutes impose upon the school and teachers the duty to instruct as to the effects of alcoholic beverages and narcotics and to instruct the students about the dignity and value of work, the dignity

and value of all legitimate occupational pursuits. (FSL Section 231.09(1)(a); 233.061.)

The policy of the department of education is reflected in a booklet entitled "A Rationale for Social Studies." In a section entitled "Values" the booklet cautions that "Attempts to teach what ought to be will either paralyze social studies with irresolvable conflict, or else move dangerously close to totalitarian concepts of education." (p. 58) Are values to be ignored then, asks the booklet? The answer is no -- there is general agreement on two values -- the basic worth of the individual and the belief in rationality. Besides the "objective, rational study of values and value differences are essential to social studies." Thus the booklet suggests that the values of other cultures and groups of people be studied objectively. And students should explore openly and without fear all values and their probable consequences.

In brief, there is little law in Florida on the authority of school districts to acculturate their students in particular social values and customs. If there is a particularly sensitive area of the school curriculum in Florida it is those aspects of the curriculum which touch upon sexual behavior. This is underscored by the explicit authority given to the districts to separate the sexes in the various schools of the district. (FSL Section 230.23(6)(a).) Beyond these provisions no cases were found dealing with the right of parents to exempt their child from a particular course, the right of parents to seek a stop to school acculturation efforts or the authority of the school district to offer ethnic study programs in which students may voluntarily enroll.

* * * * * * * * *

Before turning to a discussion of the legal position of other participants --

actual and potential -- at the local level, some preliminary comments are necessary to place the preceding and following sections in perspective. Although the preceding section on the authority of the school board indicates that within the broad constraints which shape the basic outline of the local school program, local districts have considerable discretion to formulate their own policies, several points need to be kept in mind to sharpen our understanding of the limits of that discretion. First, the Administrative Procedure Act in Florida provides a unique vehicle for seeking review of the local policies. Secondly, as will become more evident below Florida has imposed certain mechanisms of political accountability on its local districts: Reporting requirements, and the establishment of parent advisory councils either taken separately or in their cumulative impact provide a way of assuring some political accountability, a way of imposing political constraints on the local boards. Florida, more than, for example, New York has accepted the political nature of public education and attempted to regulate and shape the political process. Third, the next body of materials discusses the problem of various possible complainants obtaining standing in the courts to seek review of local district policy.

* * * * * * * * *

B. Superintendent and Principal

There are several features of Florida law which can serve to make the superintendent of schools a more influential figure in controlling the school curriculum than he is in other states as New York. First, the state constitution provides for the election of the local superintendent unless a majority of the voters vote to make the office appointive. (Florida Constitution, Article IX, Section 5; and see FSL Section 230.24 and 230.241.)

If the voters do not exercise the option of making the position appointed, then the elected Superintendent has as much right as the school board to claim that he represents the will of the people. The fact that he was elected in turn means he is not removable at will by the local board. If the district exercises its option and appoints the superintendent, then the board has more control: the superintendent does not enjoy tenure. (FSL Section 230.321)

Whatever the arrangement for selection of the superintendent, Florida statutory law establishes an unusual relationship between the board and superintendent. As a general proposition the board is instructed to "Cooperate with the superintendent at all times to the end that the district school system may constantly be improved," (FSL Section 230.23(14)) whereas the superintendent is instructed to "Cooperate with the school board in <u>every manner practicable</u> to the end that the district school system may continuously be improved." (FS Section 230.33(16) (Emphasis added).) Hence the statutes might be read as imposing a greater duty of cooperation upon the board than it does upon the superintendent.

Other more specific provisions underline the authority of the superintendent. The superintendent is given the authority to recommend the staffing pattern to be employed in the school district and to recommend the individuals to be appointed to the administrative, instructional and non-instructional positions. (FSL Section 230.33(7).) For its part, the school board may only reject the superintendent's nominations for "good cause." After rejection of the third nomination for a given position for good cause, then the board may proceed on its own motion to fill the position. (FSL Section 230.23(5)(c).) A similar but not identical provision applies to the appoint-

ment of non-instructional personnel. (FSL Section 230.23(5)(b).) Clearly these provisions give the superintendent a special opportunity to shape the school program, a task also given to him by statute (FSL Section 230.33(9)(a):

> Prepare and recommend for adoption, after consultation with teachers and principals and after considering any suggestions which may have been submitted by patrons of the schools, courses of study for use in the schools of the district needed to supplement those prescribed by the state board.

The few cases which bear upon these provisions involve the problem of board rejection of the superintendent's nominations for teaching positions. The cases are hardly revealing, simply tracking the language of the statute to the effect that the board may reject nominations for good cause which must be stated in writing. (See e.g., Adams v. State ex rel. Sutton, 69 So.2d 309 (1954); opp. Atty. Gen. 061-136 (1961) and 065-108 (1965).)

Beyond the statutory provisions and the meager case law, we note that there is a strong possibility that the superintendent in his own right might be able to obtain standing in the courts to seek review of the constitutionality of state statutes, regulations or even board directives. The case law reveals that when an official is required by law to take action which he believes forces him to violate his oath of office to uphold the constitution, or which forces him to take action which otherwise directly and personally affects him or forces him to take actions which on their face appear unconstitutional then he might obtain standing to challenge the requirement. (State ex rel. Juvenal v. Neville, 167 So.650 (1936).)

As for the principal, the legislature has recently attempted to enhance the authority of the building principal. A new provision, which was added to the code, is prefaced with a preamble stating that because of the increased possibility of collective bargaining by teachers and because of the "alarming

increase in litigation" directed at public school principals, it is necessary clearly to establish the duties, rights, and authority of the principal. Thus Chapter 74-315 enacts Section 231.085:

> District school boards shall employ, through written contract, public school principals who shall supervise the operation and management of the school or schools and property as the board shall determine necessary. The principal shall assume administrative responsibility and instructional leadership, under the supervision of the superintendent, and in accordance with rules and regulations of the school board, for the planning, management, operations and evaluation of the educational program of the school to which he is assigned. The principal shall submit recommendations to the superintendent regarding the appointment, assignment, promotion, transfer, and dismissal of all personnel assigned to the school....

This provision should be read in connection with the provisions set forth above dealing with the authority of the superintendent and board over the appointment of personnel and in particular Section 230.33(9)(a) requiring the superintendent to consult with the principals over the school curriculum. The power of the principal is further underscored by the provision in the finance law requiring that by 1976-77 fiscal year eighty percent of current operation funds from the state be expended by the basic program cost categories in each school that generates the funds and by special program cost categories in the district that generates the funds. (FSL Section 237.34(3) as amended by Chapter 74-227). This last provision gives the principal a basis upon which to demand that his building be provided with a certain level of funding: the principal is given a basis to fight for funds and to plan well in advance as to the amount of money he might reasonably expect for the forthcoming year.

The legislative concern with increased decentralization of the school district is also brought out in "The Educational Accountability Act of 1971," which establishes the statewide assessment program. The statute requires that

that the assessment results be reported "by grade and subject area for each school in the district." (FSL Section 229.57(3)(d).) Similarly Section 228.165 provides that "It is the intent of the legislature that the individual public school should be the basic unit of accountability in Florida." To that end the section requires each to make an annual report of progress to be prepared by the principal. It is the principal who must account to the public, and presumably it will increasingly become the principal to whom the public will turn with its complaints about a given school. This increased pressure on the principals may in turn prompt the principals to argue that if they are to be made responsible for the school program, then they should be given the authority to run that program. Thus the principals may become a force for further decentralization of the school districts.

In sum, Florida more than other states studied in this project has enhanced the power of the superintendent vis-a-vis the board and also taken steps beyond those found in any of the other four states studied to enhance the authority of the school principal.

C. Teachers

Nothing in the statutory code indicates teachers are to have control over the school curriculum. Indeed Section 231.09(1)(a) specifically provides that the teachers are to teach from the books and materials required, to follow the prescribed courses of study, and to use the approved methods of instruction when instructing in such areas as the essentials of the U.S. constitution, and the elements of civil government. A subsection of this same section also provides that teachers must:

> Labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue.

While it seems unlikely that a provision such as this could be the basis for controlling a teacher's behavior, in one old case a teacher was dismissed from his position because of public statements made in July of 1943 that "he was not willing to aid the United States Government in the present war declared against it by the Government of Germany, Japan, and Italy -- either in the combatant or noncombatant branches of the Army or Navy or other military forces of the United States Government," or otherwise aid the United States in the present crisis. The court upheld the dismissal based upon the above quoted provision reasoning that the teacher's conscientious objector position was inconsistent with the requirement that he teach by example the virtue of patriotism. (State ex. rel. Schweitzer v. Turner, 19 So.2d 832 (1944).)

Only a small number of cases were found that even touched upon the issue of academic freedom in Florida, and the cases found are not terribly illuminating. In Robinson v. University of Miami and Board of Public Instruction of Dade County, 100 So.2d 442 (1958) the plaintiff sought to be reinstated in the internship program which was required for the issuance of a certificate of teaching in secondary schools. Before the plaintiff could begin his internship in a Dade County public school, the principal of the school called the attention of the University (a private institution) to a letter the plaintiff had published in a local newspaper dealing with atheism. The principal suggested the University inquire into the letter and the University determined that the plaintiff was "fanatical in his views as to atheism and that he would seek to express them and impose them on students whom he might teach..." (p. 443) In papers filed with the court the plaintiff stated that he would not teach atheism, but that if he were asked a question regarding it, he would answer according to his beliefs and that he

would not be willing to limit his after-school activities with regard to atheism. The court denied the request of the plaintiff to be reinstated in the internship program. The court held that the university had sufficient reason to refuse to let the student continue. The University need not place its stamp of approval, said the court, upon a student whose fanatical ideas if imposed on impressionable minds would be calculated to operate to their detriment and injury. (p. 444).

In another case a teacher had in class been openly critical of the superintendent and discussed in class his personal dealings with houses of prostitution as well as masturbation to the extent of asking individual students if they had ever masturbated and if they said they had not, accusing them of lying. The school district denied him tenure but instead offered him a one year contract on the condition he discuss only Biology in his classes. The court denied the claim that the teacher's rights of free speech had been violated. In discussing the issue the court focused only upon the political comments made by the teacher saying that while a teacher may from time to time go into matters other than the subject of that particular class and that while the classroom may be the "marketplace of ideas" a teacher went too far when he specifically criticizes a school official before a captive audience of students. Such criticisms undermine the need "for meaningful school administration." Further, he abused his discretion when he discussed the sexual matters. (Moore v. School Board of Gulf County, Florida, 364 F. Supp. 355 (N.D. Florida 1973).) A similar concern with in-class speech is reflected in a decision of the Florida state courts. Thus in Pyle v. Washington County School Board, 238 So.2d 121 (1970) a dismissal based on the inability of the teacher to maintain discipline and for discussing sexual

matters in the class was upheld. Thus, the legal climate in Florida does not augur well for teacher's claiming academic freedom if their in-class comments approach the sort of comments made by the teachers in the preceding cases. But these cases can turn as much on precisely what the teacher said, the age of the pupils and other details that making generalizations about Florida law in this area is difficult.

As the more extensive discussions of standing below will substantiate, there is little likelihood that a teacher as a teacher could obtain standing in Florida courts to challenge a school's curriculum policy unless that policy forced a teacher to choose, for example, between obeying the school board and violating a statute or constitutional provision. (cf. Epperson v. Arkansas, 393 U.S. 97 (1968).)

D. Unions

Until the 1974 legislature acted, Florida was without an extensive statutory code governing collective negotiations between teachers and school boards despite the fact teachers were guaranteed the right to bargain collectively under the state constitution Article 1, Section 6. The new provisions establish a framework including a definition of the scope of negotiations which provides that negotiations must cover at a minimum the terms and conditions of employment. (Chapter 74-100 enacting Section 447.001(14).) There is no further explication of the phrase "terms and conditions of employment" and the Florida common law of collective negotiations provides no clue as to what the phrase might mean. But judging by the developments in New York state it is unlikely that the curriculum of the schools would be a subject on which the school would have to bargain if the union chose to place the issue on the table.

E. Parents

More than other states, Florida statutory law recognizes parents as having an interest in the education of their children. Thus Section 230.22(b) provides:

> The school board shall establish a school advisory committee or committees, but such school advisory committees shall not have any of the powers and duties now reserved by law to the school board. The school board shall develop a plan for establishing each school advisory committee, which shall include parents and students and be broadly representative of the community served by the school. The functions of each school advisory committee, including rules and regulations for its functioning, shall be prescribed by the school board; however, each school advisory committee shall participate with appropriate school personnel in the development of the annual report of school progress as may otherwise be provided by law. Each board shall make an annual evaluation of the effectiveness of each committee established and shall submit its plan and a report of the annual evaluation to the state department of education. The department shall review the reports of annual evaluation to provide to the state board of education and the legislature an annual appraisal as to the effectiveness of school advisory committees and any other information deemed by the department to be appropriate.

Thus the provision requires that there be at least one advisory committee in each school district; but it also encourages that in addition there be advisory committees attached to each school. No authority is given to the committee(s) except they are to participate in the writing of the annual report of progress. The general weakness of the bill is a result of the widespread opposition of school board members, superintendents and the PTA to a tougher provision that would have guaranteed an optimum degree of parental participation at the building level by specifying crucial advisory functions for each council. (Staff of the Florida Senate Education Committee, "A Report on School Advisory Committees," December 1, 1974.)

Data has now been collected on the implementation of this statutory provision and it shows that 29 (43%) of the school districts adopted a plan

involving advisory committees at each building whereas thirty eight (57%) relied only on a district level committee. About 10,000 people are involved in the committees most of which were appointed either by the principal at the building level or by the school board at the district level. A sample survey of participants revealed that about 15% of them were elected. In the same sample survey, 69% felt the committees were representative; of those who felt the committees were not representative of the committee, 45% wanted more minorities represented. As for the functions of the council, only about 29% indicated that their council had been involved in curriculum changes, but 62% thought their committees ought to be involved in curriculum changes. In rating their experiences as a member on these advisory committees, the predominant opinion was that a contribution had been made but more could have been done. About 56% of those from the district level committees felt this way, as opposed to 49% from the school committees. The next most prevalent opinion was that only a small contribution was made and major changes needed to be made in the committees: 23% from the district committees felt this way and 10.6% from the school level committees. Overwhelmingly, however, those questioned said both the school board and principals were supportive of the committees. (Ibid., Tables IIa, IIb, V, Vi, and X.)

The interests of parents are also recognized in Florida by the requirement that each principal prepare an annual report of school progress which is to include but not be limited to (FSL 228.165(3).):

a. Population data related to the school.
b. Results of assessment programs; including statewide and district testing conducted at the school.
c. Fiscal and cost accounting information, when available, on the school's program, including the budget of the school.
d. Summaries of the attitudes toward school held by students, teachers, administrators, and parents.
e. Results of the school's effectiveness in achieving goals established for the school.

f. Plans and programs for school level professional development.
g. Effectiveness of the school advisory committee, where existing, and other parental organizations of the school.
h. Use of the school for community purposes and the use of community facilities for school purposes.
i. Recommendations for school improvements during the ensuing year.

The report is to be distributed by June 1 of each year to the parent or guardian of a child attending that school and to other interested parties upon request as determined by the school advisory committee.

The study of the parent advisory councils reported on the above also asked the sample population about the annual report of school progress. Over 65% found the report useful and said it should be continued as is. The next largest group found the report somewhat useful but wanted more information on school problems, assessment of future needs, budget information, counseling and other special services offered, faculty comparison on turnover rates and salaries, how the committee recommendations were followed, school activities, and school board activities. Respondents were also asked whether as a result of the report parent contacts with the school went up or down in frequency. 11% reported a large increase; 24% a light increase; 32% no change. No one indicated a decline and about 32% reported they did not know. (Ibid., Tables VIII and IX.)

A main difficulty with the reports to date is the lack of uniformity from building to building, partly a result of lack of guidance from the state: The state board of education guidelines are no more specific than the statute itself. And there has been general pressure from principal and superintendent associations to reduce the length of the required report. (Department of Education, Division of Elementary and Secondary Education, Bureau of Research

and Information, "A Discussion of the Background of The Annual Report of School Progress," November 1, 1973, p. 12.) The Senate Education Committee is concerned with the problem of the uniformity and adequacy of the reports but as yet has not worked out a solution. Until there is more uniformity the quality of some reports will remain low and comparisons between buildings based on the reports will not be possible.

Statutory law also requires that at regular intervals reports are to be made by principals or teachers to parents informing them of the progress being made by their children in their studies and "giving other needful information." (FSL Section 230.23(11)(c))

In addition to all these reports it will be recalled that the statewide assessment program results in a variety of reports dealing with the state, district and building levels of the school system. Taken together this battery of reports is designed to inform the clients of the school system, as well as the general public, as to what the school system is doing, thereby both stimulating public concern with the schools and making that concern more informed. As will be discussed more fully momentarily, these statutory provisions may lay a basis for individual parents to obtain standing to seek more accurate and more complete information from the public schools. Legislative action in this area may have provided an opening which the judiciary may exploit by pushing the district fully to live up to its duty to keep parents informed. A nascent notion of a "right to know" may have been established by the statutes which in turn could mean more effective public involvement in the formulation of curriculum policy.

Before turning to the standing question, one further statutory provision should be mentioned, namely, the statutory right of parents of children who

have been classified as "exceptional" to be informed of the classification, and their right to seek a review of that classification. (FSL Section 230.23(4)(m)(4) The Administrative Procedure Act spells out the formalities that have to be followed in agency review of this sort. (Chapter 74-310, Section 120.57.) (Other "weaker" provisions covering the procedures to be followed in reviewing such placement decisions are included in the State Board regulations. (State Board of Education Regulations, Section 6A-6.331.) Again, however, these provisions taken together provide the parent with an opportunity to be involved in the classification and placement of his child. Recognition of these parental rights goes beyond the statutory provisions found in other states such as New York, but not so far as California has gone.

The Florida law of standing, as will be detailed somewhat more fully below, is in a state of confusion and perhaps change. What does seem to be clear from the cases, however, is that of all the groups that may seek to obtain standing, parents have as good a chance as any, but the courts have been careful with regard to parents to make sure that their children are directly affected by the policy being challenged. Thus in Chamberlain v. Dade County Board of Public Instruction, 143 So.2d, 21 (1963), vacated 374 U.S. 487 (1963), 160 So.2d 97 (1964), reversed 377 U.S. 402 (1964), 171 So.2d 535 (1965), the Florida Supreme Court granted parents of children in elementary school and junior high school standing to challenge the daily prayer and Bible readings but denied them standing to challenge baccalaureate programs in senior high school or the taking of a religious census when there was no evidence these children had been polled as part of the census. Parents were also given standing in another case to challenge the distribution of Bibles in the schools by the Gideon Society. The Court said the parents have an "immediate and direct interest in their natural children's spiritual

and religious development." (Brown v. Orange County Board of Public Instruction, 128 So.2d 181, 182 (1960).)

On the basis of these cases then we are forced to conclude that unless a curriculum policy directly affects the child, the chances of a parent to obtain standing to challenge the policy whether on constitutional or non-constitutional grounds appears in doubt. Hence a parent who wished to challenge a course, class, program or instructional materials to which his child was not exposed, might have difficulty obtaining judicial review.

F. Students

Students have been given no statutory rights to be involved in controlling the educational program to which they are exposed, but at the same time there is no doubt that students who are directly affected by a particular course or program would have standing to seek review. (cf. State ex. rel. Bleich v. Board of Public Instruction for Hillsborough County, 190 So.815 (1939.) The more difficult question is whether students could seek review without consent of their parents. Unlike New York there is no case law to suggest an answer as to how this question might be decided pursuant to the statutory code which provides that a court may appoint a guardian ad litem in any pending litigation when the interests of an incompetent (e.g., a child) is adverse to that of his guardian. (Domestic Relations, Section 744.12.) We have only one indirect piece of evidence on this point from a case dealing with a school district attempt to promulgate regulations dealing with the length of male students' hair. In reversing the dismissal of the complaint brought by the student when he was excluded from school, the court characterized the dispute as one between the school and the student's parents. While the school wanted the hair cut short, the parent approved of the longer style and

the court wrote "The question is whether the parent or the board is to control with respect to a matter as to which both cannot prevail. Unless that board can show some overriding necessity, this part of the child's nurture rests with the parent." (Conyers v. Glenn, 243 So.2d 204 (1971.) The implication to be drawn from the case is that the court views these "educational" matters to be either in the control of the school or in the control of the parents, and that if students have a right in these matters it is vis-a-vis the school but not vis-a-vis their parents. Hence, given the predominant voice accorded parents over their child's education -- subject only to the neglect and compulsory education laws -- it seems doubtful Florida courts would exercise their discretion and permit a suit by a child seeking review of a school district policy with which the parent agreed.

In any event there is no indication that the judiciary would be willing to intervene on many matters involving the curriculum and the student. Indeed the evidence available points to the contrary conclusion. In Militana v. University of Miami, 235 So.2d 162 (1970), a student sought an injunction to compel the university to issue him a degree in medicine. The university defended its dismissal of the student on academic grounds. The district court of appeal upheld the decision of the trial court denying the injunction and quoted with approval the language of the trial court that there is wide discretion in the school authorities and that unless the school authorities have acted in bad faith or arbitrarily, the courts will not interfere. (p. 164)

G. Taxpayers and Citizens

The cases dealing with taxpayer standing to seek review of governmental policy appear divisible into three groups. First group of cases holds that a taxpayer who has no interest in the suit which is distinguishable from the interest of any other taxpayer, lacks standing to seek review. The plaintiff

must must have arguably suffered a special injury differing from that suffered by the public in general. Thus, in Guernsey v. Haley, 107 So.2d 184 (1958) standing was denied to taxpayers who sought to block state officials from removing from the John and Mable Ringling Museum of Art certain works of art in violation of the will of John Ringling who bequeathed the art works to the State of Florida. A second, and smaller group of cases allows taxpayer suits if the subject is of public concern.

(Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 607 (1959): also State ex. rel. Hill v. Cone, 191 So.50 (1939) and Barrow v. Smith, 158 So.818 (1935).)

In the third category there are only one or two cases. Building on a Florida State Supreme Court case granting standing to taxpayers in a constitutional suit, a Florida District Court announced that the rule found in the first category of cases was on its way out. The court also noted that the newly revised state constitution assured each person access to the courts for the redress of "any injury." (Article 1, Section 21). Having disposed of the "special injury" requirement,the court proceeded to formulate a new set of requirements for standing which were more in keeping with greater public access to the courts. But at this point the court established several requirements that muddle the picture. The court's immediate concern was whether a non-profit citizens group had standing to seek review of governmental land policy affecting Sand Key, a gulf-front island. The court said the central issue was whether the organization had such a personal stake in the outcome as to ensure that it would adequately and expediently represent the interest it asserts. For

there to be such a personal stake the members of the organization must have been or will be directly and personally aggrieved in some manner relating to the scope of and interests represented and advanced by the organization. "Mere special interest in a public problem, or an assumed position as spokesman or representative of the public thereto is not enough." (Save Sand Key, Inc. v. United States Steel Corporation, 281 So.2d 572, 577 (1973).) Using these criteria the court found the organization did have standing.

The conflicting sets of cases leave unclear the chances of taxpayers for obtaining standing to review school curriculum policy. The older cases, of course, suggest standing would not be granted; and even the criteria laid down in Save Sand Key leave open to considerable doubt the chances of a taypayer's group obtaining standing. For the group to achieve standing its members would have to be personally and directly affected by the school policy, a condition that is not likely to be met unless the taxpayers were also parents of children enrolled in the schools, in which case they could obtain standing as parents. The cases which most strongly suggest the possibility of obtaining standing are those in the second category, but these cases are few in number and probably should be viewed as deviations from a generally more conservative approach to taxpayer standing.

While taxpayers may not have access to the courts, unlike many other states, taxpayers do have a better chance of influencing school officials through the political process insofar as local superintendents may be elected along with the boards, and insofar as the state board of education is made up entirely of elected officials. Perhaps we can then say that the policy of restricting the access of the taxpayer to the courts to seek review

of public educational policy is in keeping with the policy of making the formulation of policy as political as possible.

VI. Private Education

Florida law makes the mother and father jointly the natural guardians of their own children and of their adopted children during minority. (Domestic Relations, Section 744.13.) The educational duties of the parents are prescribed by the compulsory education and neglect laws. Of these two laws the most important is the compulsory attendance law as the duties imposed by the neglect law are defined in terms of the compulsory attendance law. Thus, a "dependent child" is a child who, among other things, has because of the neglect of his parents been deprived of education as required by law. (Juveniles - Judicial Treatment, Section 39.01 (10)(d).) Also a delinquent child can be one who because of irregular attendance, habitual truancy, or persistent misconduct has become incorrigible and a menace to the school he attends or should attend. (FSL Section 232.19(6)(b).)

Turning then to the compulsory education laws, children between the ages of seven and sixteen are required to "attend school regularly during the regular school term." with certain exceptions discussed below. The Superintendent of schools has the primary responsibility for enforcing this law against both the parents and the child. The parents have the duty to make sure their children attend school "as required by law" and children who do not regularly attend school may be declared to be delinquent or a person in need of supervision. (FSL Section 232.09; 232.19(6)(b).)

Before looking more closely at the duty of regular attendance, we note that certain students are exempted from the compulsory schooling law. Married, pregnant, or students who have had children out of wedlock are exempted from

regular attendance, but if they choose to attend, they are "entitled to the same educational instruction or its equivalent as other students, but may be assigned to a special class or program better suited to their special needs." (FSL Section 232.01(2).) Also certain children because of physical, mental, or emotional conditions may be exempted from attending school. (FSL Section 232.06(1).) Also certain children who live over a certain distance from school and have no public transportation available can be exempted, as can children over fourteen who obtain an employment exemption. (FSL Section 232.06 (2) and (3).)

Those students who must attend school must do so "regularly" which is defined as actual attendance during the school day at (FSL Section 232.02):

(1) A public school supported by public funds;

(2) A parochial or denominational school;

(3) A private school supported in whole or in part by tuition charges or by endowments or gifts; and

(4) At home with a private tutor who meets all requirements prescribed by law and regulations of the state board for private tutors.

There have been only a couple of opinions dealing with the nature of the obligation imposed upon parents and students by these provisions. State regulations and one case uphold the notion that for private instruction in the home to meet statutory requirements, the parent must have a teaching certificate. (State Board of Education Regulations, 6A-1.951; T.A.F. v. Duval County, 273 So.2d 15 (1973).) In 1972 the Attorney General was asked whether students attending tutorial services not provided in the home of the student and not licensed as a private school were in compliance with the educational code. It will be noted that tutoring in the home or attendance at a private school

would satisfy the compulsory attendance law. Because the tutoring did not take place in the home, the question became whether attendance at the tutoring services constituted attendance at a private school. The Attorney General did not answer that question saying that determination of this issue was up to the district school board which has the power and authority to enforce the school attendance provisions. The district was to obtain guidance from Section 228.041 (5) defining the term school: "A school is an organization of pupils for instructional purposes on an elementary, secondary, or other public school level, approved under regulations of the state board." (Opinion Attorney General, 072-90, 1972)

The difficulty with this analysis is that there is no indication that the statutory definition of school was meant to refer to a private school. Secondly, to interpret this definition as defining a private school would conflict with other provisions in the code insofar as this definition assumes a school is not a school unless approved by the state board. Other parts of the code indicate that the state does not have control over private schools and they are not subject to state regulation. (Discussed below)

Beyond these cases Florida case law to date has not yet determined when tutoring in the home meets the statutory requirements. The only other thing we know is that the state board regulations require that the tutor "hold a valid Florida certificate to teach the subjects or grades in which instruction is given." This provision obviously makes it difficult for a parent to instruct his children at home beyond the elementary grades, since no parent is likely to have a certificate for all the subjects that are taught in the public high schools that a student must take. Indeed the certification requirements imposed upon parents who tutor in the home are stiffer than the

requirements imposed upon public school teachers. It will be recalled that there is no statutory requirement that only teachers whose certificate carries an endorsement to teach a particular subject may be assigned to teach that subject. Hence, in the public schools a student may frequently be exposed to teachers who are not certificated in the subject they are teaching.

The points aside, it is important to note that there are no provisions in the Florida code which address the question of the curriculum in the private schools, hence what subjects a high school age student may be taught in the home is not controlled by the state. For example, even a directly mandated course such as Americanism v. Communism is a requirement that applies only in the public schools. "(2) The public high schools shall each teach a complete course of not less than thirty hours, to all students enrolled in said public high schools entitled 'Americanism versus communism!'" (FSL Section 233.064(2).) Neither is there any provision in the Florida code like that of the New York laws requiring that private schools provide a program "substantially equivalent" to that of the public schools. Thus, the private school curriculum basically goes unregulated in Florida.

This last point is underscored by an opinion of the Attorney General in which he was apparently construing Section 229.802 which gives to the department of education the authority to "classify or accredit schools" pursuant to state board regulations. (Emphasis added.) He answered in the negative the question whether the state board of education had authority to prescribe standards for the classification and accreditation of non-public schools. The Attorney General said he found "nothing in any of such laws specifically granting to the state board of education" such authority.

(Opinion, Attorney General, 066-12, 1966). However the Attorney General did find that the state commissioner did have authority to accredit nonpublic schools which voluntarily sought such accreditation. (Opinion Attorney General, 066-43, 1966). And the Department of Education today provides for the voluntary registration of private schools which involves filling out a one page form asking only for basic information on the grades covered by the school, the number of pupils in each grade, and number of teachers. If schools choose not to register the department has no information with regard to them. In any event the state exercises no control over private schools whether registered or not.

CHAPTER FOUR

NEW YORK STATE CURRICULUM LAW

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NEW YORK STATE CURRICULUM LAW

Introduction

The law of New York State has only a little to say about what should be or may be the goals of either public or private education, or what methods should be or may be used in teaching children. The law does have a few things to say as to what subjects students should study between the ages 6 and 16. And the law has a great deal to say about which units -- individuals, private or governmental bodies -- should play what kind of role, with what kind of powers vis-a-vis other units with regard to determining the goals, methods and content of the school curriculum. A study of the school curriculum law of New York State is, thus, largely the study of prescribed structures, processes and of institutions, and their designed relationships and the system they are intended to form.

The participants in the system are: the legislature (and Governor as he must sign the bills passed by the legislature), the Board of Regents, the Commissioner of Education, the courts, the local school districts, superintendents, teachers, teachers' unions, parents, students, private schools, and the local public in each district including interest groups. The law which governs the powers, duties and relationships among these participants is found in the state constitution, statutes, court opinions, regulations of the Board of Regents and Commissioner, the quasi-judicial opinions of the Commissioner, opinions of the general counsel for the department of education, and other more informal decrees and requirements issued by the Regents and Commissioner.

The examination of this body of materials will be taken up in the following order. Relevant sections of the New York Constitution will be

introduced and commented upon, followed by an overview of the statutes adopted by the state legislature. The State Constitution and legislation provides the general framework within which the Regents and Commissioner operate and an assessment of their authority. This last section foreshadows what is to be said about the scope of authority at the local district level since what the Regents and Commissioner do directly affects the extent of local discretion. Before actually turning to a discussion of the scope of local district authority, comment is made upon the role of the courts in the system. When local district authority is taken up, the discussion focuses both on the relationship between the local board and the superintendent and on the authority of both to control some very important details in curriculum policy. These points take us to a discussion of the role of parents, teachers, unions, and students (as well as others) in the formation of curriculum policy at the local level. A separate section deals with the situation in New York City under the recently adopted decentralization law. A final major section is devoted to private educational efforts.

I. New York State Constitution

This review of the state constitution is divided into two parts: (A) State Responsibility and Role Allocation: (B) Individual Rights. These two areas cannot be sharply distinguished since the constitutional provisions dealing with individual rights also serve the function of allocating roles between the public and private sector in addition to the function of imposing negative limitations on governmental actions.

A. The State's Responsibility and Role Allocation

Article 11, Section 1 provides:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated.

This section makes education a state responsibility, without at the same time either requiring or prohibiting the creation of local districts, the constitution requires that the basic legislative authority remain in the hands of the Senate and Assembly: Article Three, Section 1 provides:

> The legislative power of this State shall be vested in the Senate and Assembly.

Two other provisions make clear that at least some of the legislature's authority must be delegated to a department of education headed by a Board of Regents and a Commissioner of Education.

Article 11, Section 2:

> The corporation created in the year one thousand seven hundred eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercized by not less than nine regents.

Article 5, Section 4:

> ...The head of the department of education shall be the Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department...

Thus it appears the legislature may modify, but perhaps not eliminate, the powers of the Board of Regents which in turn has been given general control over the commissioner of education by its ability to remove him at pleasure.

Finally, by way of a general introduction Article 6 establishes the judiciary and in effect assures the courts of the state (Court of Appeals, the Appellate Division and the Supreme Court - in discending order of rank) with

the jurisdiction to review administrative decisions. Generally speaking, the legislature has greater control over the jurisdiction of the Court of Appeals than over the two lower courts. As for the two lower courts, the legislature may expand their jurisdiction but may not contract it, thereby assuring these courts a significant role in the state system of government especially through the ability to issue the equivalent of the common law writs of mandamus, prohibition and certiorari. This brief review of the constitutional provisions hardly exhausts the problems involved in the allocation of roles to control education. There have been, and still are, strong pressures within the state to include among the decision makers controlling education a wider range of parties such as parents and teachers. The state legislature, which has the basic responsibility for allocating decision-making roles, has responded to these pressures by creating local school districts, authorizing of collective bargaining for teachers, and decentralizing the school system in the City of New York. These pressures for wider discussion of roles with authority raise issues of the limits on the legislature's power to delegate its authority over education. The law in New York on this issue is both similar to and different from the law in other states studied.

Four aspects of the delegation doctrine will be taken up: (i) delegation to Board of Regents and Commissioner; (ii) delegation to local districts; (iii) delegation to private individuals and groups; and (iv) the sub-delegation of authority.

(i) The grant of broad authority to such appointed officials as the Board of Regents and Commissioner of Education constitutionally is made possible by the prevailing doctrine on the delegation of such authority.

The burden of establishing the impropriety of such a delegation rests with the petitioner because of the doctrine in New York State constitutional law that statutes are presumed constitutional. The difficulty in overcoming this presumption is strikingly illustrated in National Psychological Association for Psychoanalysis Inc. v. University of State of New York, 8 N.Y.2d 197 (1960) appeal dismissed 365 U.S. 298 (1961) in which the Association challenged the constitutionality of a state system for the certification of psychologists. The statute prohibited anyone from holding himself out to the public by any title or description of services incorporating the words "psychological," "psychologist," or "psychology," except the Department of Education was empowered to issue a certificate as psychologist to a citizen of good moral character, at least 21, who paid a $40 fee, "passes a satisfactory examination in psychology," has "received the doctoral degree based on a program of studies whose content was primarily psychological from an educational institution having a graduate program registered by the department, or its substantial equivalent in both subject matter and extent of training," and has had "at least two years of satisfactory supervised experiences in rendering psychological services." (Education Law, Section 7601 ff.)

The central challenge of the Association was that the statute failed to define the term "psychologist", hence it unconstitutionally delegated legislative power without accompanying standards to guide the exercise of discretion in the granting or denying of a certificate. In answer to the challenge, the court stated four related points: (1) The standards of fitness established by the

legislature imbued the title "psychologist" with meaningful content. (p. 203) (2) The State Board of Examiners by statute was to be made up of people representing different aspects of the psychology profession, hence, by implication, the court seemed to be saying that whatever the definition used it would not be the product of one branch of psychology. (p. 203-4) (3) The people who are to define the term psychology are in a better position than the legislature to define the term. (p. 204) (4) To say that the field may not be regulated, said the court, because it is not subject to precise definition, is an untenable argument: the state has an interest in regulating the field and since the statute only invades the interests of the petitioner's to the extent of prohibiting him from using the term psychologist, no further definition of that term is constitutionally required or necessary. (p. 204-5). Petitioner's may still engage in their practice without criminal penalties--they merely may not call themselves psychologists.

The opinion is highly unsatisfactory for several reasons but the fact that the court was willing to go these lengths to protect the state regulatory scheme indicates the difficulty in attempting to overturn such delegations of authority in New York. The first answer of the court is not correct: the standards of fitness, e.g., pass a satisfactory examination in psychology, hardly further defines the term psychology as this standard of fitness itself relies upon the term it is supposed to have defined. The other standards of fitness suffer from the same drawback. Secondly, that the Board of Examiners was to be made up of people representative of the field of psychology also begs the question since the question at stake here is the definition of psychology: if that term cannot be defined, how can it be determined who is to serve on the board. In any event, broad representation is no answer to the request for a legislatively determined definition. The third argument merely states that the profession of psychology may be regulated so as to prevent people from

improperly claiming they are psychologists but the legislature may turn the task over to somebody else since they would have more competence. But the question is, more competence to do what? Presumably to define the term psychologist--but why should a group of self-interested people who proclaim themselves to be psychologists have any more competence to define a term that apparently is not precisely defineable? If arbitrary definitions will have to suffice, it would seem the legislature, with the advice of interested groups, could just as easily arrive at a definition of the kind of person who may sell his services as a psychologist. Finally, the last argument of the court may be the most important. The court seems to be saying that the petitioners have merely lost their right to advertise themselves as "pschologists"--an interest not important enough to warrant protection, despite the fact the court recognized the commerical value of the term. In sum, the court approved the legislature's passing on of the problem of determining who may or may not use the term psychologist to a board of self-interested individuals. A more obvious case of legislative avoidance of responsibility is hard to find. (Cf. Darweger v. Staats, 267 N.Y. 290, 196 N.E. 61 (1935).)

In any event, what emerges from this and other cases is that even broad delegations of authority to appointed boards will not be overturned if the following factors are present in the case: (i) the subject is constitutionally available to state regulation or control; (ii) the court believes it would in effect make impossible effective control of the subject if it prohibited the legislature from turning the problem over to an agency and instead forced the legislature to make the crucial policy decisions itself; and (iii) the affected interests of the complaining party are not so important as to impell the court to force the legislature more carefully to design its regulatory scheme. In a word, the New York courts appear to have adopted a balancing approach in settling the question of improper delegation: if the affected interests of

the individual are not so fundamental as to deserve special protection and the means adopted by the state for achieving a legitimate state objective are viewed as necessary, then the delegation will be upheld. (Paterson v. University of State of New York, 14 N.Y.2d 432, 252 N.Y.S.2d 452, 201 N.E.2d 27 (1964); Chiropractic Association of New York, Inc., v. Hilleboe, 228 N.Y.S.2d 358, 16 A.D.2d 285, aff'd 12 N.Y.2d 109, 187 N.E.2d 756, 237 N.Y.S.2d 289 (1962); City of Utica v. Water Pollution Control Board, 5 N.Y.2d 164, 182 N.Y.S.2d 584 (1959).)

When the above listed factors are not present in a case, the petitioner has a chance in striking down the delegated authority. Thus, in Packer Collegiate Institute v. The University of the State of New York, 298 N.Y. 184, 81 N.E.2d 80 (1948), the petitioner successfully challenged a delegation of authority to the Commissioner of Education to register private nursery, kindergarten and elementary schools. A school which was not registered could not be established or maintained. In striking the statute down for failing to include sufficient standards to guide the Commissioner, the court stressed this was not a "small or technical matter" as "Private schools have a constitutional right to exist, and parents have a constitutional right to send their children to such schools. (Pierce v. Society of Sisters, 268 U.S. 510 (1975). The Legislature under the police power, has a limited right to regulate such schools in the public interest (Pierce v. Society of Sisters, supra; Meyer v. Nebraska, 262 U.S. 390 (1923). Such being the fundamental law of the subject, it would be intolerable for the Legislature to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to make such regulations as he or they should desire, and to grant or refuse licenses to such schools, depending on their compliance with such regulations." (pp. 191-192.)

Thus, in this case the delegation failed because it affected a constitutional right to an extent greater than in the National Psychological Association case. There the right to use the term "psychologist" was at stake where as here the very right to operate a school or of a parent to control his child's education was at stake--rights which had been given explicit protection by the Supreme Court.

A related case sheds further light on the court's approach to problems of delegation of authority. In Jokinen v. Allen, 15 Misc. 2d 124, 182 N.Y.S.2d 166 (1958), the authority of the Commissioner to provide for the voluntary registration of private nursery and/or kindergarten schools was upheld. The court said that Section 207 of the Education Law--the section confers on the Board of Regents the power to "...exercise legislative functions..."--furnishes the basis for the voluntary scheme of registration and the court must presume Section 207 to be valid in the "absence of clear and convincing proof to the contrary, and may not pass upon its constitutionality when the issue has not been raised by the pleadings." (N.Y.S.2d, p. 172) But this may be an anamolous decision insofar as we have here a court upholding a statute which grants to a state agency "legislative functions." Most courts when confronted with a statute like this would probably have felt constrained to strike it down, for if this statute is upheld, what is left of Article III, Section 1? Yet it may also be possible that the court took the phrase "legislative functions" not to mean "legislative power" in the sense of the term used in Article III, Section 1, but simply to mean that the Regents had been delegated consistent with the state constitution the basic policy-making responsibility in the state system of education.

As will be detailed below, the legislature has taken advantage of the generally lenient approach of the courts to these questions of delegation to

delegate enormous authority to both the Board of Regents and the Commissioner of Education to control the public system of education. That authority has seldom been challenged, but when it has, the courts have upheld the delegation. (Board of Education, Union Free School District No. 1, Town of Bethlehem v. Wilson, 303 N.Y. 107, 100 N.E. 2d 159 (1951); Board of Education, Union Free School District No. 3, Town of Oyster Bay v. Allen, 6 A.D.2d 316, 177 N.Y.S.2d 316, 177 N.Y.S.2d 169 (1956) aff'd 6 N.Y.2d 871, 188 N.Y.S.2d 988 (19), reargument denied 6 N.Y.2d 983, 191 N.Y.S.2d 952 (1959); appeal dismissed 361 U.S. 535 (19); Gardner v. Ginther, 232 A.D.296, 250 N.Y.S. 176 (1931) aff'd 257 N.Y. 578, 178 N.E. 802 (1931).) In these cases the delegation to the Commissioner to re-draw district boundaries was upheld.

(ii) As noted, Article II, Section 1 neither requires nor prohibits the legislature from establishing local school districts. The controlling provision is Article Three, Section One vesting legislative power in the Senate and Assembly. This last provision has always been interpreted to permit the establishment of local school districts and no case was found striking down a grant of authority to a local school district as a violation of the implied prohibition against the delegation of legislative power. We must turn to cases dealing with the delegation of authority to municipalities and other units of government to gain an understanding of state law on this point and here we find a general reluctance on the part of the courts to strike down any grant of authority as a violation of Article Three, Section 1. Thus in People ex. rel. Unger v. Kennedy, 207 N.Y. 533, 101 N.E. 442 (1913), the constitutionality of a statute which, on the one hand, created the County of Bronx, but on the other hand, provided for submission to the voters in the borough of Bronx the question, "Shall the territory within the borough of Bronx be erected into the county of Bronx?" and that if it should appear "that a majority of the votes cast on said

question at said general election were against the erection of the county of Bronx, then this act should (shall) be inoperative and void." A lower court struck the law down as an unlawful delegation of legislative power on the theory that the Legislature had in effect passed a law creating the new county to take effect at once and then by the provision just quoted provided for the repeal of the law if a majority of voters did not approve the creation of the new county. On appeal, the Court of Appeals reversed the Appellate Division saying that despite the language of the statute, the statute did not in its own terms provide for its own repeal nor was the act to be construed as delegating to the voters the choice of whether the statute would become law. Rather the proper view was that the statute was a law the moment the legislature adopted it, and the voters merely were given the opportunity to determine if it were to become operative. (p. 543) Further, the court stressed the statute "under consideration is not one of state-wide operation, but it only affects directly and substantially the people of a comparatively small territory, and it was to the voters of this territory most affected that the right was left to determine whether the act should become operative." (p. 543) Thus the court was able to distinguish the case of Barto v. Himrod, 8 N.Y. 483 (1853) in which the Court of Appeals struck down a statute establishing free schools throughout the state with the additional provision that "The electors [of the state] shall determine by ballot at the annual election to be held in November next whether this act shall or shall not become a law." (Emphasis added.)

Perhaps what the court in Unger was trying to say, in other words, was that the legislature in the Barto decision had truly abdicated its responsibility in that an issue of state-wide concern, an issue truly of concern to the legislature was not decided by the legislature when it could easily have been.

Indeed the state constitution contemplates that legislative matters are to be decided in a formal way by elected officials acting in public, and not by plebiscite. The legislature had no need to resort to the plebiscite. In the Unger case, however, the issue at stake was not a matter of state-wide concern, and there was no existing local body which logically should and could have decided the question. It was only logical then that this matter of local concern be submitted to the group most interested in the issue.

The Kennedy case thus established the proposition now accepted in N.Y. that the legislature may pass a statute the operation of which in particular instances is dependent on or affected by a future contingency such as the vote of the local populace affected by the law. The distinctions between this proposition, the situation in Barto and the situation in which the electorate can "repeal" the law have been drawn by the Court of Appeals without supporting reasoning. But, perhaps the proposition which emerges from Kennedy gains a stronger foothold if it is viewed as but a way of saying the legislature may adopt an enabling or empowering act pursuant to which the legislature creates a discretionary authority in a local constituency. Hence, as with all enabling acts the agent under the Kennedy proposition is given the option whether or not to take advantage of the power entrusted in it by the legislature. The legislature in adopting a statute such as in Kennedy has adopted a complete law and completely adopted the law. A legislature need go no further in order to fulfill its responsibility in making law. A law has been made when a power which did not exist before has been created. For example, the legislature may permit a local district to offer programs of instruction in which a language other than English is the medium of instruction. Having done this, the legislature need do no more - now it is up to the district to exercise its authority.

Aside from the benefits usually associated with local, the practical justification for such discretionary authority vested in local government is simply "necessity": if the legislature were not able to vest subordinate units of government with discretionary authority to make policy choices affecting that local area, government might not be able to operate.

(iii) If authority may be delegated to local groups, the issue arises as to which local groups may be given authority either by the legislature or the local district itself. (If the local district delegates authority to a sub-population of the district this raises the additional question of the authority of the local board to sub-delegate its powers. This question is taken up in section (iv).) One way the issue has been discussed is in terms of a prohibition against the delegation to private groups. But then we must ask why is the delegation of authority to private groups improper? Professor Frank I. Michelman suggests that what is at stake here is a problem of the abuse of power. He argues that a delegation is termed a delegation to a "private" group, so as to lead to the delegation being struck down, when the delegation is subject to abuse: that is, we label a delegation as a delegation to a private group (and thus impermissible) when the problem of abuse of that power is sufficiently clear. To determine whether the problem of abuse exists we need to probe two aspects of the delegation by asking two questions: (1) What sort of authority is it that is being delegated. If exercised can the authority harm individuals, coerce them or is it merely authority to either confer or not confer a benefit? Does the authority touch upon interests that are not trivial but of some importance to the individuals potentially affected. (2) To what extent is the recipient group of the authority, representative, disinterested, accountable and not so narrow with respect to the subject matter of the authority that there is neither the sense that members have some general dependency upon one another for pursuit of the good life, nor the opportunity for trade and compromise that creates at least the chance of everyone's benefiting from the common enterprise.

As Professor Michelman puts it, the resultant vector of these two dimensions will be some kind of unfairness or exploitation vector.

If the value is too great, the delegation will be invalidated and the recipient of the authority will be called private. But the term "private" then does not refer to any fixed universal set of identifying characteristics, but to the unsuitability of this group as a recipient of this power.

The following examination of New York cases reveals that the New York courts have arguably followed this line of analysis without having articulated their approach as clearly as has been done here. What we learn from the cases is that (1) certain legislative powers are deemed to be core powers because of their capacity to be abused, to injure people and should not be delegated. (2) The authority granted appears less ominous if it is not much greater than that already enjoyed by private citizens generally. (3) Fear of abuse is lessened when some mechanism exists for making the recipient of the power accountable to the public in general or some disinterested body. (4) The possibility for abuse is also deemed less if the delegated authority is checked and constrained by the actions of a publicly accountable body. (5) There is less chance of abuse if the delegation is accompanied by standards to guide the exercise of the authority. (6) Similarly the chances for abuse are less if power is shared by the recipient group and a publicly accountable body. (7) When those subjected to the exercise of authority have either subjected themselves voluntarily and/or have interests which are not severely affected by the involuntarily imposed constraint then the arrangement is viewed with less suspicion.

As for the cases, we turn at the outset to four cases in which legislation was struck down as unconstitutional. These cases set the outer limits of judicial tolerance of governmental arrangements that are open

to abuse -- open to the exercise of public authority for private gain.

In Fink v. Cole, the Court of Appeals struck down legislation which permitted a private racing association to issue the licenses to individuals which made them eligible for employment in certain capacities at the race track. The evil involved in these attempts to authorize a private association to license race track employees was twofold. First, the court stressed that the officers of the association who has the sole discretion to issue licenses "are neither chosen by, nor responsible to the State Government. They are not sworn as public officers, nor are they removable as such." Secondly, the court noted that even if licensing authority had been vested in a public agency, it was flawed in that the authority was not guided by legislatively established standards. (Fink v. Cole, 302 N.Y. 216, 224-5 (1951); also see Murtha v. Monoghan, 7 Misc. 2d 568, 169 N.Y.S.2d 137 (1957), aff'd 169 N.Y.S.2d 1010 (1957); aff'd 4 N.Y.2d 897, 174 N.Y.S.2d 648 (1958).)

The second case, Darweger v. Staats, 267 N.Y. 290 196 N.E. 61 (1935) struck down a state law which made applicable to intrastate business those codes, agreements, license, rule or regulation which had become binding upon interstate business pursuant to the National Recovery Act, 48 U.S. Stat. 195 (1933) [N.R.A.] and which had been filed with the office of the department of state in New York. Under N.R.A. industrial codes could be drafted by the industry itself and would become binding on the industry after presidential approval. In declaring the state law making these codes applicable to intrastate business in New York, the court stressed the state law was a "mere shell, leaving to National bodies or officials the power to make the laws of New York." (p. 307) "The Legislature has declared an

emergency in industry and left it for others beyond its power or control to do the rest. It has not created or appointed any agency representing the People of the State to form rules or regulations or to even determine that price-fixing in the coal business is necessary." (p. 306)

In a third case the courts were asked to review a decision of the Unemployment Insurance Appeal Board which held that Frank Fiol's voluntary separation from his work with a steamship company after one round trip voyage did not disqualify him for unemployment insurance even though he was offered to continue his employment. Fiol refused the work in compliance with a union rule which provided that in the case of men such as Fiol who were not full members of the Seafarer's union and who obtained their employment through the medium of the hiring hall operated by the union they could retain employment for the duration of one round trip or sixty days, whichever was the longest. Upon review in the courts, the issue was raised whether the Unemployment Insurance Appeal Board felt legally bound to accept the union rule as good cause for the voluntary relinquishment of employment, and if so, whether acceptance of the rule constituted an unconstitutional delegation of legislative power to the union. The Appellate Division wrote:

> As we view the decision of the appeal board we do not find it held itself bound, as a matter of law, to recognize any and all regulations of the union. To the contrary we think it found that, under the circumstances and within the statute, claimant had good cause as a matter of fact for relinquishing his employment. It held in effect, of course, that the union's sixty-day rule was not unreasonable. This involved, in our opinion, no unconstitutional delegation of legislative power.

(Matter of Fiol, 279 A.D. 963 111 N.Y.S.2d 288 (1952).) The Court of Appeals reversed in a per curiam opinion, saying "...the mere fact of the existence of such a union rule did not warrant the conclusion the claimant was excused from continuing his employment." The Appeal Board had to go further and

explicitly (not implicitly) determine if the claimant was justified in complying with the union rule which involved the further inquiry as to whether the rule--given the nature of the industry, the labor market and other relevant considerations--was reasonable. "To hold otherwise would be to allow the union to determine arbitrarily what constituted 'good cause' for the claimant's leaving his job--a function which the Labor Law entrusted to the referee and the Appeal Board (see Labor Law §623)" (Matter of Fiol, 305 N.Y. 264, 266 112 N.E.2d 281 (1953).)

Finally, in dictum in several other cases the courts have flatly said that the taxing power may not be delegated to private parties, thereby implying a distinction between kinds of legislative authority some of which may be more delegable than others. A core legislative power such as the power to tax is most certainly absolutely not delegable. (Gautier v. Ditmar, 204 N.Y. 20 (1912); Cook v. Up-To-Date Silk Yarn Dyeing Co., Inc., 155 Misc. 435, 278 N.Y.S. 348 (1935).)

In the next set of cases the courts found that the delegation of authority was not unconstitutional.

An old and interesting case is Fox v. Mohawk & Hudson Riv. Humane Soc., 165 N.Y. 517 (1901) in which the Court of Appeals upheld a grant of authority to the Humane Society to seize unlicensed dogs, and, if not redeemed within forty-eight hours, to destroy or otherwise dispose of them at the discretion of the society. The Court said "nor...do we think it represents a case of the delegation of governmental power to a private corporation, as unlicensed dogs have been so long subject to destruction by every person, the authority given to the officers or agents of the defendant to kill such dogs is neither greater nor less than that conferred on other citizens."

In 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 313 N.Y.S.2d 733 (1970) New York City established a complex system for regulating rents and other terms of leasing for one class of rental property. The scheme involved a Rent Guidelines Board, the nine members of which were to be appointed by the Mayor and paid by the city, no member of which could be an owner of real estate covered by the rent control system or was an officer of a tenant's organization. This Board was to establish guidelines for rent increases upon renewal leases or new tenancies. Also to be created was a real estate stablization association made up of landlords covered by the rent control system. Belonging to the association was voluntary but if a landlord did not join, his properties were subject to regulation by the standard system of rent control operated entirely by city agencies. The advantage of falling under the new system of regulation was that the restrictions on the raising of rents and on the other terms of rental were less severe from the landlord's viewpoint. In order to be recognized as the official association for participating in this scheme of regulation, the group claiming to be that association had to gain approval from the Housing and Development Administration. This agency would only give approval to the association if it met certain criteria to assure its openness and fairness of operation. Once established, the Association was charged with itself "establishing" the Conciliation and Appeals Board: the Appeals Board was to be appointed by the Mayor but the salaries of the members of the Appeals Board as well as office expenses was to be paid by the Association. This Appeals Board was to act upon complaints from tenants and upon appeals from owners claiming hardship.

The Court of Appeals upheld this scheme against the charge it involved the improper delegation of legislative power to a private association on the ground, "Certainly no 'legislative power' has been passed on under any possible conception of that term." (p.132) The Court also wrote that "The right of any member aggrieved by action of any association to have review before the Conciliation and Appeals Board seems a sufficient answer to the suggestion that the city has yielded a type of judicial power to the association." (p. 133) Finally, the willingness of the court to uphold novel governmental arrangements in which private parties play a role is underscored by the comment that "...[F]air latitude should be allowed by the court to the legislative body to generate new and imaginative mechanisms addressed to municipal problems." (p. 132)

In this connection it is worth noting Bergman v. Lindsay, 25 N.Y.2d 405 255 N.E.2d 142 (1969) cert. den. 398 U.S. 955 (1970), in which it was charged the Board of Estimate of New York City was malapportioned. Under the city's Charter the Mayor is to prepare and submit to the Board of Estimate and City Council, which is a body "vested with the legislative power of the city" his operating budget for the fiscal year. Either the Board of Estimate or the Council could alter the original budget by adding or eliminating items. The Mayor in turn may veto the change but his veto may be overridden by a vote of two-thirds of the Council and two-thirds of the Board of Estimate acting together in identical terms. In upholding the way the Board of Estimate's membership was apportioned, the Court of Appeals said among other things, that the Board was an indigenous local governmental institution which "neither fits fully into the role of a legislative body, nor has 'general

powers over the entire geographic area' within" the meaning of that phrase as used by the Supreme Court in its reapportionment cases.

Bergman is significant for showing the lengths to which the Court of Appeals will go to avoid interfering with novel local governmental arrangements. The Court of Appeals has refused to call the work of the Board of Estimate legislative despite the fact that the budgetary process is at the heart of most legislative work: the budget is the main vehicle by which basic policy is established. When the Court of Appeals says this work is not legislative it flies in the face of both common sense and understanding.

In Lanza v. Wagner, 11 N.Y.2d 317, 229 N.Y.S.2d 380, 183 N.E.2d 670 (1962), state law established a panel whose job it was to nominate not less than 18 names for possible appointment by the Mayor of New York City to the city school Board. The nominating panel was to be made up entirely of heads of private organizations interested in education. The Court of Appeals upheld the delegation of authority to the panel for, among other reasons, that the state constitution, Article IX. Section (9), overrode Article 3, Section1. Article IX provides that certain local officers (presumably including local school officials) may be elected or appointed "as the legislature may direct." This last quoted clause, the court argued, gave the legislature special powers in this area to arrange for this kind of appointment process. But beyond this the Court wrote: "In point of fact, it is an exceedingly narrow and artificial view to emphasize, as the plaintiffs have, the 'private' character of the selection boards." (p. 333) Presumably the Court was attempting to draw attention here to the fact that the members of the board, while picked because they represented

certain organizations and groups, would in their official capacity as nominating panel view their job from a broader perspective than simple self-interest. The nature of their role may by itself encourage a concern with the public interest. In short, perhaps the court simply did not sense a potential for abuse in this situation.

The Court in Lanza also stressed that the final decision as to who is to be appointed to the board rests not with the nominating panel but with the Mayor of the City: "Under the statute before us, it is the Mayor (or in certain contingencies, the Commissioner of Education) who has been given the responsibility of making the actual appointments to the Board." (p. 332) The power of the nominating panel in constraining the Mayor is, however, strong as the panel need only suggest 18 names for the nine member board. Thus, in effect, the Court of Appeals was up-holding an arrangement of shared power over the selection of the school board. Willingness to approve arrangements involving the sharing of power is also reflected in 8200 Realty Corp. v. Lindsay, supra.

Sharing authority as a reason for approving delegations of authority is closely tied to another reason for approving, namely, that the private body is accountable to a public body for its actions and policies. The existence of some mechanism of accountability in 8200 Realty Corp. led the court to distinguish that case from Fink v. Cole, the racing case discussed above.

Similarly, 8200 Realty Corp. is distinguishable from those other cases on the ground that a public body--the Rent Guidelines Board-established standards within which the Association had to work with regard to rents if not the other terms of renting.

Apparent delegations of authority have also been upheld on the ground that those affected by the delegation of authority submit themselves voluntarily. Thus, in General Electric Co. v. Masters Inc., 307 N.Y. 229, 120 N.E.2d 802(1954) appeal dismissed, Masters Inc., v. General Electric Co., 348 U.S. 892 (1954) the Court of Appeals upheld the New York fair trade law on the grounds cited in Old Dearborn D. Co. v. Seagram, 299 U.S. 183 (1936). There the Supreme Court upheld the Illinois fair trade law which permitted a manufacturer to stipulate to a buyer of his product the price at which buyer must resell the product. In upholding the law against the challenge that the statute delegated to the manufacturer legislative authority to fix prices, the Supreme Court stressed the buyer did not have to buy the product of the manufacturer and that the statute merely authorized the manufacturer to impose such a restriction on the sale of his property. Similarly, the trial court in 8200 Realty Corp. upheld the regulatory scheme on the ground, among others, that those affected by the rulings of the Association were voluntary members who did not have to join the Association and thereby become bound by its rulings. (8200 Realty Corp. v. Lindsay, 60 Misc. 2d 248, 304 N.Y.S.2d 384 (1969).)

Yet another factor considered in these cases is the nature of the interest affected. As was noted with regard to the cases in which the delegation was struck down, the courts seem to weigh heavily substantial intrusions upon property rights. In those cases /when the delegation of authority has been upheld, the courts have expressly, and by implication, noted that the interests affected are not substantial. Thus in Fox v. Mohawk & Hudson River Humane Society, supra., the Court of Appeals noted that dog owners historically had but a "qualified

property in dogs, cats and similar animals, and, in fact, there may be said to be no property in them as against the police power of the state." (p. 521) And in Szold v. Outlet Embroidery Supply Co., 274 N.Y. 271 8 N.E.2d 858 (1937) motion gran. 275 N.Y. 542, 11 N.E.2d 741 appeal dism. 305 U.S. 623 (1938), the Court of Appeals upheld a grant of authority to the medical society of the county to recommend who may be authorized to provide medical service at state expense in workmen's compensation cases. In responding to the argument of the plaintiff that the delegation was not accompanied by sufficient standards, the Court answered that charge by saying: "In application for authorization, a duly licensed physician 'shall state his training and qualifications' and shall agree to limit his professional activities under the law 'to such medical care as his experience and training qualify him to render.' He may 'present to the medical society or board evidences of additional qualifications at any time subsequent to his original application.' When an application is granted, 'such recommendation and authorization shall specify the character of the medical care which such physician is qualified and authorized to render.' " (p. 278-279) The court's reply is hardly a satisfactory answer to the complaint that the medical society had not been sufficiently constrained in the exercise of its power. But what the court might have mentioned in defense of arrangement was that the medical society could only recommend a physician -- the final decision was in the hands of the State Industrial Commissioner and that if a doctor were not recommended he could appeal to the Industrial Council of the Department of Labor. Hence the medical society did not exercise power that was wholly unchecked.

The analysis of these cases provides a basis for a few comments upon the possibilities of new arrangements to provide greater parental involvement in the development of curriculum policy in the public schools. It would appear that in New York many possible such arrangements might withstand a court challenge. As long as the arrangements did not go as far in delegating authority as in the first four cases analyzed above, thereby transgressing the outer limits of legislative discretion in establishing novel governmental arrangements, the chances for success seem good. Thus, the Massachusetts law which permits 20 parents with 20 children to obtain a new course in a school may very well be struck down in New York insofar as it seems to place in their hands unaccountable control over the curriculum. However, any arrangement in which parents merely constrain the choices available to public officials (as in Wagner v. Lanza) or share authority under a system of guidelines established by the public officials (as in 8200 Realty Corp.) may very well survive court scrutiny. Even an arrangement at the school building level in which parents of children attending the school were given some bargaining rights with regard to the curriculum might survive. Or mixed parent-school official boards with final control over curriculum may be acceptable. Whatever the arrangement for sharing power, if the power so shared is such that it is not permitted excessively to constrain the children of unwilling parents thereby avoiding treading on the rights of parents to control the education of their children, the chances for surviving court review further increase. In sum, it should not be too difficult to devise arrangements for greater parental involvement in the control of school curriculum which would be acceptable to the courts. The cases analyzed above reveal the lengths the courts will go to avoid having to interfere in novel governmental arrangements. To date, advantage has not been taken of this permissive legal climate. As will be seen below, parental rights in controlling the school curriculum in New York are negligible.

(iv) There are few precedents dealing with the question whether local units of government or state agencies may sub-delegate their authority absent express authorization to do so. The two cases which touch upon the question hold that express authorization to sub-delegate is necessary. (People v. Dalton, 205 Misc. 689, 131 N.Y.S2d 355 (1954); Matter of Fiol, op. cit.) With regard to local school districts this doctrine poses no significant problem as enabling acts give local boards the power to determine the duties of district employees and these provisions would seem to be able authority on which to base a delegation of authority. (Education Law § 1709(1), 1711(1), 1805, 2503, 2508, 2554(2); 2566.)

As a general proposition New York courts have held that the sub-delegation of authority must be accompanied by sufficient standards to guide the exercise of discretion. (City of Tonawanda v. Tonawanda Theater Corp., 29 A.D.2d 217, 287 N.Y.S.2d 273 (1968). The basis for this holding has never been made clear in the cases. Presumably the requirement involves considerations of both statutory interpretation and constitutional law. If adequate standards were not incorporated in the delegation of authority it would be possible for a local governmental plenary body to in effect give away its power, which it has no statutory authority to do. In addition, the lack of adequate standards might invite arbitrary action by the officials who have been given the authority placing those subject to the official in the difficult position of not knowing what actions he may take with regard to them. Those subject to the official are in effect without notice as to the rules with which they must comply.

As it turns out, however, the standards need not be stated with great specificity. In a case involving the delegation of authority to

zone, the court said it has generally been held that a standard meets legal requirements if it only tells the zoning board that it must, for example, allow for "adequate" light, air or water. (Schmitt v. Plonski, 215 N.Y.S.2d 170 (1961).)

Only one sub-delegation case was found dealing with the public schools. In that case the Board of Education in New York authorized principles to assign teachers to "reasonable amounts of" extra curricular duties beyond their responsibilities in the classroom. Principals were also instructed to as far as practicable make sure the assignments were equitably distributed. Records of these assignments were to be kept by the principal and if a teacher felt unfairly treated, he or she could appeal to the assistant superintendent. The court found that these arrangements provided adequate safeguards for the teachers. (Parrish v. Moss, 200 Misc. 375 106 N.Y.S.2d 577 (1951), ff'd 279 A.D. 608, 107 N.Y.S.2d 580 (1951).) This case lends support to the conslusion the boards of education may delegate authority to work out the basic educational program of the district so long as the board has itself adopted an overriding policy which now merely must be implemented. The policy statement might not even have to be very detailed at all.

B. Individual Rights

Regardless of who must be given certain authority or who may be given authority under the constitution there are certain restraints imposed upon the exercise of that authority by the rights given to individuals by the state's constitution. Most significant here is the emerging notion of a right to an education under the New York Constitution. Article 11, Section 1 quoted above has been involved in two cases dealing with one aspect of the

question of what sort of right to an education if any, exists under the state constitution. First the section was interpreted not to bar the establishment of separate schools for black and white children. (People v. School Board, 161 N.Y. 598, 56 N.E. 81 (1900).) Second and more recently, the provision was involved in two cases dealing with one aspect of the question of what sort of right to an education, if any, exists under the state constitution. Thus in Matter of Kirschner, 74 Misc. 2d 20, 334 N.Y.S.2d 164 (1973), a parent sued for an order directing the county to pay the full cost of sending his child to a private school for handicapped children. Under New York law when a school district is unable to provide appropriate services for a physically handicapped child, the parent can seek reimbursement from appropriate units of government for the payment of the costs of educating a child in a private school capable of providing the needed services. In this case, the county balked at paying the full fees on the ground the parent was financially able to pay for his child's education. The court ruled, however, that to force the parent to contribute to the cost of educating his child would violate Article II, Section 1 as well as the Equal Protection Clause of the Fourteenth Amendment. (Also see In Re Downey, 72 Misc. 2d 772, 340 N.Y.S.2d 687 (1973).) But the court limited its ruling to tuition and transportation costs, thereby leaving the door open to the forced contribution from parents for medical and maintenance expenses. Similarly In Re Claire, 44 A.D. 2d 407, 355 N.Y.S.2d 399 (1974) the Appellate Division ruled that there was no violation Article II, Section 1, or a denial of equal protection of the laws to require parents of physically handicapped children to contribute toward the maintenance costs incurred by the child in a residential school. In a poorly articulated opinion, the court seemed to be

saying that Article II, Section 1 only assured instruction without cost to the parent, not maintenance of the child. As for the equal protection issue in the case, the court merely said "Since there is a rational basis for differentiating between blind and deaf children and children with other type handicaps, no invidious discrimination results (of Education Law Articles, 85, 87, 88)." (p. 403) (Also see McMillan v. Board of Education of State of New York, 430 F2d 1145 (1970).) It might be noted that the court's willingness to let the legislature draw a distinction between the blind and deaf reflects an accurate perception of the Supreme Court's likely position on such an issue. Since the Court has refused to recognize education as a fundamental interest -- except, perhaps, when a child wholly has been denied an adequate education -- and since the case does not involve any racial elements, the rational basis equal protection test applies in such situations. Under that test the state's classification scheme would only be struck down if totally without rationality, and it is rare that the courts ever find a legislatively determined classification to be wholly irrational. (San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972).)

Because the use of Article II, Section 1 has to date been limited to determining the question of who must pay for a child's instruction and maintenance, the efficacy of the provision as a vehicle for a broader attack upon the educational system of the state remains untested. For example, the article requires that state support be provided for schools where children "may be educated." The quoted language arguably imposes upon the state an obligation to provide effective education for all children--schools which are merely custodial and fail to provide some undefined minimum of education

may not satisfy the constitutional requirement. Although the intellectual difficulties involved in mounting such an attack are not to be underestimated, the existence of the Article should not be ignored since the Article apparently permits a litigant to avoid the problems entailed in using an equal protection line of attack--problems such as the fact that an equal protection clause does not necessarily protect children against an equal distribution of inadequate services. Furthermore, overcoming the limitations of the protection provided by Equal Protection clause has been accomplished before in other states by reliance upon provisions of the state constitution. Thus in New Jersey, the state system for financing education was struck down as failing to meet the standard imposed by the state constitution that the legislature provide for a "thorough and efficient" system of public education. (Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).) Hence a victory for financial reform was achieved in New Jersey despite the Supreme Court's ruling in the Rodriguez decision declaring that Equal Protection clause did not protect against inequalities in the amount of money spent per pupil at the local level arising out of a state effort to bring about fiscal, political and administrative decentralization. (San Antonio Independent School District v. Rodriguez, op. cit.)

One final point: Since the language of the article is broad--"may be educated"--the article provides little guidance for the legislature or anybody else as to what the goals and methods of the educational program provided should or may be. The article does not by itself seem to require that an effective general education be provided, as opposed to, for example, an effective vocational education. What the substance of the educational program supported by the state should be is not constitutionally settled. The only further guidance the state constitution provides on this point is in Article 1, Section 3 dealing with the free exercise of religion. (Discussed below.)

Other provisions touching upon individual rights are:

Article I, Section 3:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Article I, Section 8:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press...

Article I:, Section 3:

> Neither the state nor any subdivison thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

Probably because of the availability of the federal courts on issues related to the above provisions, little state law of relevance to the control of the curriculum has been developed. Further, state courts when confronted with issues dealing with religion, speech, or equal protection tend to rely upon the U.S. Constitution and the decisions of the U.S. Supreme Court. And the more important decisions which have been rendered in the state courts have been taken to the Supreme Court for final resolution. (Engle v. Vitale, 370 U.S.421 (1962); Zorach v. Clauson, 343 U.S.306 (1952); Board of Education v. Allen, 392 U.S. 236 (1968); Walz v. Tax Commission of the City of New York, 397 U.S.664 (1970).) Because of this situation the basic discussion of issues of free speech, equal protection and religion will be reserved for a separate essay on the U.S. Constitution and school curriculum.

It might be noted here that in the past prior to the major Supreme Court opinions dealing with prayers in the schools the New York courts did permit the reading from the Bible without note or comment under Article 11, Section 3. (Lewis v. Board of Education of City of New York, 157 Misc. 520, 285 N.Y.S. 164 (1935), MOD. 247 A.D. 106, 286 N.Y.S. 174 (1936), rearg. and motion den. 247 A.D. 873, 288 N.Y.S. 751, app. dism. 276 N.Y. 490, 12 N.E.2d 172 (1937). In Engle v. Vitale the state courts ruled that a prayer composed by the Board of Regents could be used in the public schools if provision were made to excuse those who did not wish to participate in the recitation. Hence, prior to the major Supreme Court opinions on the subject of prayers in school, New York courts did not prohibit the use of prayers or the Bible. More recently, opinions and decisions from the department of education have ruled that: (1) it is not permissible to open the school day by saying "We will now have a minute of silence to acknowledge our Supreme Being." (Op. Educ. Dept., 3 Educ. Dept. Rep. 255 (1964)); (2) the use of passages from patriotic songs as prayers is not allowed. (Matter of Appeal of Jurgen Worthing, 3 Educ. Dept. Rep. 7 (1963); Matter of Appeal of Miriam Rubinstein, 2 Educ. Dept. Rep. 299 (1962)); (3) the study of Christmas and the birth of Christ using just factual material is permitted as well as the presentation of plays depicting historical traditions and the display of a Christmas tree. (Op. Educ. Dept., 3 Educ. Dept. Rep. 264 (1963.))

Recently in face of the strict prohibitions against prayers as such in schools, the New York legislature has attempted to keep the door open just a bit for the voluntary saying of prayers in the classroom by individual students. Section 3029-a provides:

> (1) In each public school classroom, the teacher in charge may, or if so authorized or directed by the board of education by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent meditation with the participation of all the pupils therein assembled.

> (2) The silent meditation authorized by subsection one of this act is not intended to be, and shall be not conducted as, a religious service or exercise, but may be considered as an opportunity for silent meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day. As used in subdivision one of this section the term 'participation' shall be construed to permit seated participation and not to require any pupil to stand.

In essence, at the discretion of the board or of an individual teacher, time in the school day may be set aside, or, put differently, students may be released from school strictures to pay attention to secular matters, for individual contemplation of religious matters if the individual student so chooses to use the time. The arrangement shares some of the features of the constitutionally accepted practice of released time programs but differs in several respects: first, the student does not leave the school grounds for his religious observance and secondly, having been released he need not, in contrast with the case of released time programs, use the time for religious observance, or education. Indeed, the only required participation here is that the students be silent; their minds may remain a "blank" or may be filled with religious thoughts and sentiments. Those who wish to use the time for religious purposes do so with school support to the extent that school disciplinary rules prevent the other students from interfering with the religious meditator and school facilities are made available. Indeed, the non-religious participants are to an extent forced to be silent witnesses to those who do use the time for religious observance. Those who are silently praying may subtly reveal this fact to their peers by the silent motion of lips and perhaps even with the use of religious gestures such as genuflection, clasping of hands in prayer-like ways; the making of the sign of the cross and the use of Rosary beads. Because of all these many differences between the New York silent meditation law and released time programs, it seems a plausible conclusion that

if challanged this law would fall beneath the Supreme Court's standard prohibiting the excessive entanglement of church and state. (Walz v. Tax Commission of the City of N.Y., op. cit.; Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).)

It might be noted here that New York State has had a long tradition of attempting to aid private education. Despite Article II, section 3, the legislature has authorized the loan of textbooks to private schools and most recently attempted to provide private schools with money for cutodial services, and parents of students in private schools with tax deductions and even direct grants toward payment of the tuition. While the Supreme Court approved the textbook program the other efforts were struck down. (Board of Education v. Allen, op. cit.; Committee for Public Education and Religious Liberty v. Nyquist, op. cit.)

II. Legislature

Except to the extent Article I, Sections Three, Eight and Nine (quoted above) limit the legislature's control of the curriculum, there are no constraints in N.Y. law on the legislature's authority: in it rests the basic authority to determine the purposes and methods of education. And the legislature has exercised its authority in several ways: (1) it has prescribed specific courses which must be taken by public and private school students; (2) it has more by implication than by direct legislation established standards to be followed by the public schools and private schools; (3) it has classified students with each classification enjoying different rights and subject to different treatment; and (4) it has allocated authority within the state among various participants--Board of Regents, Commissioner, courts, boards of education, superintendents, parents, students and others.

While the details of the legislature's handiwork will be revealed throughout this discussion of New York law, some general statements are provided as a starting point.

First, the legislature has attempted to strike a compromise between the views that education is exclusively a state versus a local concern. This is made evident by the pattern in which authority has been allocated between state and local officials: the legislature has given concurrent authority to control the curriculum to, on the one hand, the Board of Regents and Commissioner, and, on the other hand, the local districts. No clear demarcation of authority between these parties is provided by the legislature, leaving it to the participants themselves to work out, with the aid of the courts, their relationship. Thus, to what extent the curriculum is controlled by the state or controlled locally is left unresolved by the legislature.

As for controlling the substance of education--its purposes and methods--the legislature has enacted several provisions which touch upon: (1) General minimum curriculum requirements whether in the form of general minimum standards or requirement that specific subject matters be taught and/or taken by students; (2) Requirements and authorizations to provide for special needs (vocational, handicapped and bilingual); (3) Anti-discrimination requirements; (4) Compulsory education requirements (including neglect laws); and (5) Requirements for teacher certification and the dismissal of teachers.

Many of the laws regarding the specific content of the curriculum directly impose duties upon the students and parents, whereas others are directed to the Regents, the Commissioner and the local boards of education. And some of the laws impose duties upon almost all the participants at the same time. With these laws the legislature has assumed direct control of children's

education itself, delegating nothing except the duty to execute its decision. Hence the legislature has departed in these instances from its usual function in merely allocating roles. Section 801 (1) of the Education Law provides a good example:

> In order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, the regents of the University of the State of New York shall prescribe courses of instruction in patriotism and citizenship, to be maintained and followed in all the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, over the age of eight years, shall attend upon such instruction.
>
> Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools over eight years of age shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools of the city or district in which such pupils reside.

Section 801 continues with other course requirements in the "history, meaning, significance and effect of the provisions of the consititution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto,..." and then requires the regents to determine the "subjects to be included in such courses of instruction." The Commissioner of Education is to enforce these provisions and "shall cause to be inspected and supervise the instruction to be given in such subjects."

A handful of provisions deal with instruction related to the use and display of the flag, physical education, the nature of alcoholic drinks, drugs and their effects, and highway safety involving both the automobile and bicyle. More basic curriculum requirements, applicable to all children, are included in Section 3204:

2. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States.

Section 4602 imposes an additional duty upon boards of education:

The board of education of each school district shall provide secondary school pupils and adults access to programs of occupational education, commensurate with the interests and capabilities of those desiring and having a need for preparatory training, retraining or upgrading for employment, and develop realistic programs in accord with manpower needs in existing and merging occupations for present and projected employment opportunities.

Other statutory provisions impose upon boards the requirement to provide special classes for various kinds of handicapped pupils (Sections 4401). And yet other provisions empower the power to provide a variety of kinds of course offerings and services: special classes for underachievers; bilingual programs for non-English speaking pupils; vocational and educational guidance services; programs involving part-time school and part-time employment; courses in "communism and its methods and its destructive effects;" and courses in the use of firearms. (Education Law §809-a; §8204; §4404; §4605.)

Before leaving this brief sketch of the laws affecting school curriculum, an important point should be brought out. The legislature, Regents and Commissioner have created separate categories of children with regard to whom different state minimum educational requirements are applicable. The list is as follows:

a. All elementary school children (1st - 8th grade)

b. High School Graduates who receive a Regents Diploma

c. High school graduates who receive a diploma, but not a Regent's diploma

d. Several categories of handicapped children:

   i. physically handicapped

   ii. emotionally handicapped

   iii. educably mentally retarded

   iv. trainable mentally retarded

   v. the multiple handicapped

   vi. children with learning problems

e. Underachievers

f. Students of limited English speaking ability

g. Children excluded from school as being non-educable

h. Students assigned to part-time day schools

i. Students in parental schools

j. Students assigned to special day schools or special classes set apart in the regular public schools

k. Students in private schools, including nursery schools, kindergartens, elementary and secondary schools

m. Students in publicly established industrial high schools

n. Students in orphan schools, Indian schools

The materials below provide more details about most of the classifications, but it might be noted that the state having established a classification of students piece-meal over the years has not adequately attended to the issue of the relative equality of the instruction provided each of the students in these classifications. For example, the law dealing with the handicapped requires the school district "Where ten or more handicapped children who can be grouped homogeneously in the same classroom for instructional purposes such board shall establish such special classes as may be necessary to provide instruction adapted to the mental attainments and physical conditions of such children." (Education Law §4404.) The law does not make clear if this provision releases the school board of the obligations imposed by Section 3204 quoted above.

Neither are the statutory provisions entirely clear as to the obligation of a school district with regard to delinquent students who have been assigned to special day schools or classes. A tangentially related opinion by the Commissioner of Education states that a student assigned to an "adjustment" class may not be deemed to have been suspended from school if the instruction in the class is substantially equivalent to that provided in the regular classes. Such criterion leaves much room for differences to occur. (Matter of House, 11 Educ. Dept. Rep. 215 (1972).)

The state legislature thus has created the outlines of what the educational program should look like. The details are to be filled in by the Regents, the Commissioner and the local school districts. As can be seen from the statutes, however, the legislatively determined outlines are so broad that important decisions have been delegated to other participants in the policy making process.

III. Board of Regents and Commissioner

A. Board of Regents

The State Constitution gives the legislature considerable discretion as to how much authority to invest in the Board of Regents. (Article 11, Section 2.) What the legislature has done is to grant the Regents authority stated in the broadest of terms. Section 101 places the Regents in charge of The University of the State of New York, the corporate name for the education department in the state government. The Regents are charged with "the general management and supervision of all public schools and all of the educational work of the state,..." (Education Law, Article 3, Section 101; Section 5, Sections 201, 202.) In Section 207 the legislature provides: "Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except as to the judicial functions of

the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charges upon the university and the education department." (Emphasis added.) Additionally, the legislature in §3204 after providing for the courses of study for the first eight years of full time public day schools, for high schools, for part time day schools, evening schools and parental schools, added the following: "Changes in courses of study. The state education department shall have power to alter the subjects of instruction as prescribed in this section." Under one interpretation the "subjects of instruction" refers to the very items listed in the statute itself, e.g., the twelve common school branches of arithmetic, reading, etc. Thus, the Regents are by the terms of the statute granted authority to modify the statute itself. Under another interpretation we can take the word "alter" to mean to change but not eliminate, by adding to, combining, or otherwise modifying while retaining the essence, of the subjects of instruction specifically prescribed. By reading "alter in this way we can ensure the constitutionality of the statute. The main difficulty with this interpretation is that it seems unlikely the legislature would use the term "alter" as a way of granting only the power to add to the list of required subjects. Certainly power to add to the list could have been delegated in language that more clearly conveyed such an intent. By using the broader language of the statute the legislature leaves the impression that it did intend to allow alteration of the list in the sense of allowing the department to both add and subtract subjects of instruction from the list. Hence the possibility remains that the law is an unconstitutional delegation of authority to modify the terms of a statute.

Other statutory provisions grant the Board of Regents other important powers:

Section 208:

> The regents may confer by diploma under their seal such honorary degrees as they may deem proper, and may establish examinations as to attainments in learning, and may award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Section 209:

> The regents shall establish in the secondary institutions of the university, examinations in studies furnishing a suitable standard of graduation therefrom and of admission to colleges, and certificates or diplomas shall be conferred by the regents on students who satisfactorily pass such examinations.
>
> Any person shall be admitted to these examinations who shall conform to the rules and pay the fees prescribed by the regents.

Section 210:

> The regents may register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in this state.

Section 214:

> The institutions of the university shall include all secondary and higher educational institutions which are now or may hereafter be incorporated in this state, and such other libraries, museums, institutions, schools, organizations and agencies for education as may be admitted to or incorporated by the university. The regents may exclude from such membership any institution failing to comply with law or with any rule of the university.

These provisions taken together provide a mechanism whereby the Regents and the Commissioner may control the quality of the educational program offered in the public schools. Sections 210 and 214 provide for the registration of public schools or, as it is sometimes put, the admission of schools to the university. Regulation 3.30 of the Board of Regents provides:

> Secondary schools and academic departments of school districts in the State of New York may upon proper application and after official inspection be admitted to the University by a vote of the Regents. Such school shall afford not less than 175 days in each year of approved academic instruction, equipment and teaching force, and may hold Regents academic examinations in the subjects covered by their approved courses of study for the grades for which they are admitted.

Regulation 3.31 then provides the requirements for an approved course of study, and the provisions are more broadly stated than in the statutory code. For example: "A high school (senior) shall maintain an approved four-year course of study above the eighth grade and shall have approved apparatus and library. Such term shall include the six-year high school, covering the work of grades seven to twelve." (Reg. 3.31 (c).) Only when one turns to the Commissioner's Regulations are the requirements for an approved course of study spelled out in somewhat more detail than in the statutes. (Discussed more fully below.) The penalty for not maintaining an approved course of study is that the district may not receive any state aid. (Board of Regents, Reg. 3.35, 3.31; Education Law §306) To assure that the approved course of study is being carried out, the Regents have the authority to visit, inspect, examine into any institution in the university and to require any reports the Board may deem necessary. (Education Law, Art. 5, Section 215.) There are no indications the Regents exercise its power under Section 215.

The ability to control authority to control the granting of degrees is the other major mechanism available for controlling the school curriculum. Control of all degrees, Section 208, is coupled with the power to establish standardized tests as standards for graduation under Section 209. Regulation 6.4 establishes that:

> Diplomas shall be granted only to pupils who meet the requirements for graduation. Regents diplomas shall be granted to those students meeting Regents requirements. School diplomas shall be granted to those students completing prescribed special courses approved by the Department of Education.

What this means in practice is that while the local district issues all diplomas, those students who meet certain requirements have affixed to their diploma a "Regents Seal" indicating their completion of the requirements. In order to obtain this seal students must take a comprehensive Regents examination in English and social studies, as well as complete a sequence of three courses in any field, such as science. Those courses must be courses which end with a Regents examination, which he must pass. (The Regents prepare and grade the exams but the local districts administer them.) In addition the student must earn more than the minimum number of credits that it takes to graduate from high school, e.g., 18 credits instead of only 16. An interesting twist here is that a student may fail the so-called Regents course but nevertheless may receive credit for the course if he passes the Regents exam. Similarly, a student can fail the exam but still might get credit for the course. It is also possible for a student to obtain the Regents seal by "testing out" of courses by simply taking the Regents exam. Few students exercise this option.

Regents examinations are offered in roughly 20 subjects. Districts must use the state-provided examination. A state syllabus is available which outlines the materials which need to be covered in a course in order to prepare students for the exam. Hence, the Regents exams become a way of the state controlling the curriculum in the local schools. There are disputes, however, among educators as to the extent the syllabus-cum-examination does in fact tie the hands of the local district. The extent to which the syllabus really does lead to state prescription of the course content in Regents courses depends upon the imagination of the teacher and the ability of the students to absorb the basic minimum requirements of the syllabus and yet take on even more work in the same course. Also in recent years

in certain subjects, e.g., social studies, the examination has moved toward the testing of reasoning and analytical ability and away from testing the ability to memorize dates, names, places. As a result, the state syllabus has lost importance for successful completion of these exams.

A state syllabus is available for almost all subjects at all grade levels--they are issued by the curriculum departments in the department of education--but unless a Regents exam is tied to the syllabus it merely represents a suggested course of study without any penalty for non-use. At the same time, districts can get out from under the possible burdensome requirements of the state syllabus which is tied to a Regents exam, by seeking approval of their own locally developed courses and examination in lieu of the Regents exam. (Board of Regents, Reg. 3.35 (b).)

The Board of Regents assures the use of Regents examinations by providing in its regulations that no school district will receive state aid unless it makes general use of the Regents examinations in the senior high school grades. (Reg. 3.35 (a) (1).)

Students who do not receive a Regents diploma simply go through a program which purportedly meets the minimum requirements established by the legislature and department of education. But, as loose as the Regents control is over the so-called Regent courses, the control over the details of the non-Regents courses is even less.

All in all, one comes away from a reading of the statutes and the regulations of the Regents with the opinion that the Regents have made a minimum effort to carry out their curriculum responsibilities. Their regulations are stated in the broadest terms and end by delegating the real work to the Commissioner of Education:

The commissioner shall establish regulations governing the following:

(a) approved course of study in public schools;
(b) subject in which Regents examinations are given in such schools;
(c) the method of rating answer papers;
(d) the credits to be allowed for subjects in which Regents examinations are not regularly offered.

(Reg. 8.4)

In addition, the Commissioner is to appoint the 15 member New York State Examinations Board which is to develop the exams as well as the syllabuses covering the subjects of study in the elementary and secondary schools. (Reg. 8.1(b).)

One final matter is worthy of a little attention. New York has had a history of concern with subversion in the public schools which culminated in a series of statutes included in the Civil Service Law, the Penal Code, and Educational Law establishing a complicated internal security system. The system included among other things a disclaimer oath, the establishment of lists of subversive organizations, prohibitions against organizing or becoming a member of certain organizations on the part of school employees, the loss of one's job for treasonable or seditious utterances or acts. The Regents were obliged to issue regulations implementing the security system which they did. These laws and regulations were challenged in two cases. The first challenge in Adler v. Board of Education, 342 U.S. 485 (1952) failed but when challenged 15 years later in Keyishian v. Board of Regents, 385 U.S. 589 (1967) the laws were struck down due to vagueness and overbreadth in violation of the Fourteenth and First Amendments.

Even after Keyishian, the legislature persisted in its efforts to make sure subversives did not teach in public schools, colleges and universities of the state by prescribing another oath requiring the teacher to swear his support of the constitutions of the State and Nation. (Education Law, §3002.)

The statutes also provide a mechanism whereby textbooks in use in the public schools can be challenged for containing seditious or disloyal matter, or material favorable to the cause of any foreign country with which the United States may be at war. (Education Law, Section 704.) A commission made up of the Commissioner of Education and two people to be appointed by the Board of Regents are to hear the charges against the textbooks. Several challenges have been brought but none have been successful. (See untitled decisions reported in 1 Educ. Dept. Rep. 837-844 (1955-56); and 2 Educ. Dept. Rep. 553 (1963).)

B. Commissioner of Education

The Commissioner of Education is removable at the pleasure of the Board of Regents and subject to their general direction and control. (Education Law, Section 301, 303). All the other provisions spelling out the authority of the Commissioner must be read in light of this fact. That is, despite the language in many of these provisions seemingly giving the Commissioner independence from the Regents, he ultimately remains in their control. With this in mind we review some of those sections. Section 310 gives the Commissioner certain judicial functions:

> Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same: and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:
>
> 1. By any school district meeting.
>
> 2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.
>
> 3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

These functions the Regents by statute may not regulate. (Article 5, Section 207.) [This statutory prohibition against the regulation by the Regents of this function of the Commissioner may violate Article 5, Section 4, of the state constitution.]

Although the statutory prohibition against the regulation by the Regents of the Commissioner's judicial function is the clearest example of the apparent independence the Commissioner seems to enjoy from the Regents, other provisions also give him a certain independence. Section 308 provides:

> The commissioner of education shall also have power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents.

Similarly, Section 305 establishes the general powers and duties of the Commissioner or chief executive officer with general supervision over all the schools in the state. And in Section 4402 we find that with regard to handicapped children the state department of education shall ". . . formulate such rules and regulations pertaining to these physical and education needs of such children as the commissioner of education shall deem to be in their best interest."

Beyond these general enabling provisions, various statutory provisions touching upon curriculum (see p. 12 above) impose additional duties (and powers) on the Commissioner (sometimes with and sometimes without a clause stating his actions are subject to the approval of the Regents). It is how the Commissioner has carried out some of the more important of these provisions the review now turns.

Pursuant to the directions of the Board of Regents, the Commissioner has issued regulations dealing with the requirements for approved courses of study in the public schools. The regulations dealing with the first eight years of schooling expand upon the list of courses in Section 3204(3)(a)(2) by adding music and visual arts. The regulations dealing with an approved four-year high school course of study are like the provisions of 3204(3)(a)(1) except that the number of units for each subject are specified; that science must be taught in the ninth year and that guidance and counseling programs shall be provided. The regulation ends by saying: "These subjects shall constitute the 'constants' or required subjects and shall be offered in accordance with the State syllabuses." Hence it is through the syllabuses that detailed control is attempted. Finally, these regulations also provide for the courses to be included in a junior high school, a subject not covered by Section 3204. (Reg. 100.1 (d).)

Section 100.2 of the regulations establishes 16 credits as the minimum necessary for high school graduation. Districts are free to require more than 16 credits indicating the control of the curriculum has not been totally preempted by the state. But while 16 credits might be sufficient to obtain a "school diploma" apparently 18 credits are required for the so-called Regents diploma. Also to obtain a Regents diploma it appears that the Commissioner has determined that not only must the course of study be approved but the high school must be registered with the University. (Reg. 103.2(2) and (b).)

As for examinations in the public schools, the regulations of the Commissioner simply provide that "Examinations shall be given in subjects and at times and places designated by the Commissioner." And, "Elementary and secondary schools shall administer such examinations as are designated by the Commissioner as necessary for proper supervision or evaluation of educational programs." Pursuant to these regulations the Commissioner administers the system of Regents examinations which, as mentioned above, can have and do have in certain school districts which do not attempt to free themselves of the restrictions, an important controlling effect on the content of Regents courses.

Also required of school districts are the so-called PEP tests (Pupil Evaluation and Performance). These are designed as student-body evaluation devices not as tests to determine the performance of a particular student for purposes of granting or withholding course credit. These tests do not have any direct impact upon the curriculum of the school as they are intended to test the basic minimum skills in reading and arithmetic that school districts are already obliged to offer in the elementary grades. But the test results have had a political impact in various districts as test results are reported in the newspapers with the result that low or declining scores may prompt an outbreak of parental concern for the quality of the education provided in the district. Individual Superintendents and Boards may also take advantage of the tests to build within their own systems an accountability system for teachers. Finally, the results of these tests have implications for the amount of state aid a district may receive. A special aid program for urban districts having a heavy concentration of "pupils with special educational needs associated with poverty." The definition of "pupils with special educational needs" incorporates the use of the test scores obtained on the PEP tests. Money received under this program is to be used for the pupils with special educational

needs according to regulations promulgated by the Commissioner. (Education Law, Section 3602(11).) The Commissioner for his part has established that before any urban aid is granted the districts must submit a district plan to be approved by the Commissioner. The curricular emphasis to be taken in these projects is upon the basic skills in "reading, mathematics and bilingual processes." (Reg. 149.4 and 149.5.) Control of the curriculum is advanced through economic incentives combined with ad hoc program approvals.

Other grant programs administered by the Commissioner which through the use of economic incentives can affect the school program are those dealing with special instruction for children with limited English speaking ability; with pre-kindergartens for children in disadvantaged areas; with experimentation and innovation in improvement of instruction; with the elimination of racial imbalance and improvement of integrated education; and for "umbrella programs" which "means any one of the following school-community interaction umbrella programs: curriculum and teacher growth, guidance, basic skills; communications." (Regs. Parts 148, 153, 154.) The regulations with regard to these programs are extremely general and provide no guidance as to what programs are going to be approved or how districts in fact might be constrained by the policies of the Commissioner in seeking funds.

Through his power to issue regulations, the Commissioner has taken additional steps to control the local school program: he has set minimum requirements for programs dealing with handicapped children, non-English speaking children; underachievers; and industrial high schools, and health and physical educational training. However, these regulations deal only with the extent to which the different classes for the various handicapped children as defined by the regulations may include children of different ages, the size of the classes (ranging between 10 and 18, depending on the type of student

involved) and the kind of teaching certificate that must be held by the instructor in these classes. What the actual program must be is left in the hands of the local districts.

As for students who "underachieve" the regulations simply provide that after suitable examinations to ascertain the physical, mental and social causes of such failures, results of the examinations "shall be reviewed by the school authorities in order to determine the best procedures to alleviate or remove, in so far as possible, the causes of failure or 'under-achievement' for each child." (Reg. 203.1(b)(3).) As for the non-English speaking pupil, the regulations do not deal with the question of the nature of the program to which the children should be exposed. They deal largely with definitions for the purpose of determining the services for which reimbursement for teachers will be allowed.

As for industrial high schools which might teach such courses as machine shop, printing, automobile repair, dressmaking, plastering, tailoring, mechanical drawing, certain chemistry courses and other courses, the school district establishing such a high school must receive prior approval of the program from the Commissioner. Certain minimum course offerings must be provided in English (four units), social studies (including American History) (three units), science (one unit), health (one-half unit) and physical education.
(Reg. Part. 111.)

The most detailed specifications are reserved for the health and physical education program including intramural and interschool sport programs. The regulations on these programs alone run over six pages of small print.

Before turning to the Commissioner's judicial role, some concluding comments are necessary to place the foregoing discussion in perspective. As

should be evident, the Commissioner has issued only the sketchiest of curriculum requirements yet at the same time reserved to himself the authority to approve or disapprove curriculum changes in the school. The overall policy is summarized in the following paragraph:

> Nothing herein contained, however, shall prevent a board of education from making such curriculum adaptations as are necessary to meet local needs and conducting such experimentation as may be approved by the commissioner. This principle of flexibility shall apply to every area of the curriculum. The exercise of initiative and responsibility on the part of local school authorities in the administration of the curriculum is encouraged. (Reg. 100.2(b).)

This statement coupled with the possibility of local districts substituting their own syllabuses and exams for the Regent's syllabuses and exams underlines that inter-governmental relations within the New York public school system have been designed to encourage a cooperative effort between state and local officials. On the one hand, the minimum requirements established by statute and regulation do not preclude significant local initiative; even the state testing program and the syllabuses do not necessarily restrict the local district. On the other hand, an ultimate check or veto power remains in the hands of the Commissioner; it is the "stick in the closet" that can be taken out if necessary. The Commissioner supposedly gets his opportunity to veto a curriculum change when the district voluntarily comes to him for approval. That districts regularly seek out the Commissioner for approval of their curriculum changes--other than substituting a local exam for the Regents exam--does not, however, appear to be the case. Hence, if the Commissioner is going to override a district's curriculum decision he must actively supervise the local districts, which he does not do, or wait until an aggrieved party pursuant to Section 310 seeks review of a local district decision. This latter approach may be most consistent with local control.

To fully understand the impact the Commissioner may have upon the curriculum policy of a local district when he acts pursuant to Section 310, it is necessary to outline some of the general features of his judicial power and how he has tended to use his authority. The cases with which the Commissioner is presented can be broken into several categories. Table 1 provides a statement of those categories as well as the Commissioner's response to each type of case:

Table 1

	Will Accept the Case	Will Not Accept the Case
Alleged Arbitrary Exercise of Local Discretion	X	
Unconstitutional exercise of Discretion	X	
Interpretation of state statute	X	
Attack on Constitutionality of statute		X

Into which category a given case falls often is simply determined from the face of the pleadings. The difficult problem is separating those cases which should fall into the arbitrary exercise of discretion category from those that belong in the interpretation-of-statute category. The importance of this distinction affects the scope of the Commissioner's review of the case as well as affecting (1) the question whether a court might also share original jurisdiction over the case with the Commissioner and (2) the scope of a court review of a decision rendered by the Commissioner. (These last two points will be taken up below.)

It is with regard to an attack upon the exercise of discretion that the manner in which the Commissioner exercises his authority is most visible. While the courts have regularly maintained that Section 310 as well as the other

provisions of the educational code give the Commissioner authority to substitute his judgment for that of a local district even if the the local district judgment was not arbitrary or capricious, the Commissioner has regularly maintained he will not overrule a local district unless their decision was arbitrary and capricious. (Matter of Vetere v. Allen, 15 N.Y.2d 259 258 N.Y.S.2d 77, 206 N.E.2d 174 (1965), cert. den. 382 U.S. 825 (1965). The result of this position in the curriculum area is that the Commissioner has refused to interfere with the few curriculum decisions which have been appealed to him. Thus, regardless of whether the issue was one of whether the New York City school board could cancel a famous (notorious?) experimental school program conducted in I.S.201, or whether it involved the unwillingness of a district to provide a student with support for access to certain vocational courses offered at the County Vocational Education and Extension Board, or whether it involved a change in the organization of schools from 5-4-3 plan to a 4-4-4 plan, the Commissioner has refused to intervene. (Matter of Talbot, 10 Ed. Dept. Rep. 83 (1970); Matter of Wvischard, 8 Ed. Dept. Rep. 116 (1968); Matter of Scism, 11 Ed. Dept. Rep. 172 (1972).)

The extent of the Commissioner's restraint can be accurately gauged in the case just cited in which a student sought from the district financial support to pay the costs of taking an automobile repair course offered by the county since such a course was not available at his regular school. The Commissioner refused to intervene despite the fact that Section 4602 (quoted above) requires school districts to make available to secondary pupils programs of occupational education. Now this provision does not specifically require that automobile repair be among the courses offered, hence the Commissioner

could reasonably take the position he will not himself determine which vocational courses are to be made available. Further, the Commissioner may not have wanted to make a ruling on this matter in a Section 310 proceeding. If he had wanted to require districts to make available, somehow, instruction in automobile repair, he may very well have preferred to issue a regulation on the subject, thereby giving all districts advance warning and allowing for a uniform set of exemptions on the ground of, e.g., small size or lack of demand.

In one case, however, the Commissioner did intervene on a curriculum matter. The school district had set up an additional driver's education class to accommodate an unusually large number of students who elected to take the course. Mid-year the school cancelled the additional section and a student appealed to the Commissioner, who ruled that having started the class the district could not then abolish it in April. (Matter of the Appeal of John R. Heath, 2 Educ. Dept. Rep. 468 (1963).)

In summary, as with the Board of Regents, there is a big difference between the scope of authority granted the Commissioner and the extent of its exercise in the curriculum area. The Commissioner has issued only the most general of regulations on school curriculum and been restrained in the exercise of his judicial power.

IV. The Courts

Because the courts are constitutionally established and are constitutionally guaranteed a minimum jurisdiction which cannot be curtailed, but can be expanded by the legislature, they enjoy a significant degree of independent authority to shape educational law. (Article 6, Sections 1, 3, 4, 7; Kagen v. Kagen, 21 N.Y.2d 532, 289 N.Y.S.2d 195, 236 N.E.2d 475 (1968).)

The starting point for understanding the scope of the courts jurisdiction is the common law of jurisdiction which the State Constitution codified as the minimum for the courts. The scope of the courts' jurisdiction has, however, been expanded by legislation. Explicit expansion of direct importance here was effected by section 3001 of the Civil Practice Law and Rules creating the action for declaratory judgment by means of which review of local school district as well as commissioner decisions can be obtained. Additionally, Article 78 of the Civil Practice Law and Rules abolished the procedural distinctions between the old forms of action--mandamus, certiorari, prohibition--and supposedly maintained the substantive features of these actions as established in the common law. (Gimprich v. Bd. of Educ. of City of New York, 306 N.Y. 401, 118 NE2nd 578 (1954).) However, in codifying the scope of review available under these forms of action, and particularly the scope of review under mandamus, the legislature appears to have opened the door to an expanded review of local district and commissioner actions by the court. Discussion of Section 3001 and Article 78 will be taken up below after taking up the related question of the original and exclusive jurisdiction of the courts.

A. Original and Exclusive Jurisdiction

The question of original and exclusive jurisdiction arises when a petitioner seeks review in the courts of an action of a local district before seeking review before the Commissioner. A prominent judicially created doctrine dealing with this issue is that the courts may not take original jurisdiction when the case involves a pure question of the exercise of discretion. (See Table 1 above.) The court should reject the case based on the failure to exhaust administrative remedies. (Rynsky v. Kantro, 57 Misc.2d 924, 293 N.Y.S.2d 934 (1968).) [When a case involves the interpretation of a

statute, the claim of an unconstitutional exercise of discretion, an aggrieved party has a choice of forums: court and Commissioner. The courts and the Commissioner share original jurisdiction.]

But theory and practice in determining original jurisdiction does not always coincide. The courts have been willing to take cases which some might argue according to the courts' own doctrines originally should have been decided by the Commissioner. Thus courts have taken questions of the proper exercise of discretion and handled them by dismissing the petitions for failure to state grounds for relief (Van Husen v. Board of Education of City School District of City of Schenectady, 26 A.D.2d 721, 271 N.Y.S.2d 898 (1966).); by denying the applications because "the directive comes within the familiar rule that the courts will apply the presumption of reasonableness to the acts of public officials taken for the general welfare." (Ackerman v. Rubin, 35 Misc. 2d 707, 231 N.Y.S.2d 112 (1962); and by granting summary judgment after concluding that "The actions of these defendants in formulating and executing this plan were neither arbitrary nor capricious, as these terms are defined by law." (Etter v. Littwitz, 49 Misc. 2d 934, 268 N.Y.S.2d 885 (1966) Aff'd 28 A.D.2d 825, 282 N.Y.S.2d 724 (1967); Rosenberg v. Board of Education of City of New York, 196 Misc. 2d 542, 92 N.Y.S.2d 344 (1949).); by dismissing the case on the merits after concluding that an appeal to the Commissioner would have been more appropriate and that the court lacked the power to review the judgment of the school board unless the discretion was abused. (Leeds v. Board of Education, Union Free Sch. Dist., 16 Misc. 2d 649, 190 N.Y.S.2d 126 (1959).) These cases involved the assignment of a mathematics teacher to permanent study hall duty; the refusal of the school district to admit a precocious student to a two-year special progress class instead of a three year special progress class; the willingness of a school district to accept from

a city school district a few black students as part of an Educational Enrichment in Inter-Cultural Relations Program"; the selection by the school district of the books Oliver Twist and The Merchant of Venice; the adoption of a school district of an austerity budget.

A clear case reflecting judicial willingness to intrude upon the Commissioner is the Scott v. Board of Education of Union Free School District No. 17, Hicksville, 61 Misc. 2d 333, 305 N.Y.S.2d 601 (1969). In that case the school had adopted a rule flatly prohibiting all girls from wearing slacks. While schools have general authority to issue regulations, the question was in this case whether this was a proper exercise of that authority --was the rule arbitrary? This is precisely the kind of issue that ought to have gone to the Commissioner first; nevertheless, the court heard and disposed of the case.

Several conclusions with regard to the doctrine of exhaustion of remedies are possible in light of the cases. (1) The doctrine is not good law today because either (i) the courts themselves have abandoned their own doctrine, or (ii) the legislature has abolished the rule and in effect expanded the court's jurisdiction when it adopted Article 78. There is some indication that the passage of Article 78 was significant here insofar as Section 7803 provides, among other things, that one of the issues on review under the article can be the question of "abuse of discretion." (2) The doctrine of exhaustion of remedies never was the prevailing view in the common law. One lower court has stated that this is the case. (In Re Skipwith, 14 Misc. 2d. 235, 180 N.Y.S.2d 852 (1958).) In any event, while the doctrine still appears on the scene it is used erratically and poses no clear bar to access to the courts.

New Yorkers as a result have two ways in which they might seek review of the exercise of authority by local districts -- the courts and the Commissioner. Additionally, the courts are available for reviewing the actions of the Commissioner. Both the Commissioner and the courts are, however, reluctant to impose their judgments upon those whom they are reviewing. Review provides some protection but is hardly a sure-fire way of achieving one's policy ends. This point will be brought out more clearly below.

B. Scope of Review: Local Districts

Turning to a more specific discussion of scope of judicial review, Section 3001, C.P.L.R. provides:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiflable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

In New York the purpose of the declaratory judgment "is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations and it may be resorted to only when circumstances render it useful and necessary to accomplish such ends." (Todd v. Board of Education of City of Syracuse, 272 A.D. 618, 620, 74 N.Y.S.2d 468, 470 (1947).) Hence in New York declaratory relief is available to obtain court review of jural rights as to conflict which may emerge (Baer v. Kilmorgen, 14 Misc.2d 1015, 181 N.Y.S.2d 230 (1958).) and to obtain court review of actions already taken (Board of Education of City of Syracuse v. King, 280 A.D. 458, 114 N.Y.S.2d (1952), appeal denied 280 A.D. 1033, 117 N.Y.S.2d 674, appeal dismissed 304 N.Y. 973 ( ).)

Most important for these purposes is the fact that declaratory judgments primarily are designed to settle questions of law--statutory interpretation and constitutional issues. (See cases cited above.) However, the presence of issues of fact do not preclude actions for declaratory judgment. (Teperman v. Amron, 7 A.D.2d 857, 182 N.Y.S.2d 763 (1959).)

If a party seeks review of a matter of discretion which is not interpreted as a question of law and the court believes the action should be brought pursuant to Article 78, or vice versa, the petitioner is not thrown out of court for having pursued the wrong form of action: The court merely continues with the case as though it had been properly brought under Article 78. (See Section 103(c), C.P.L.R.; Strippoli v. Bickal, 21 A.D.2d 365, 250 N.Y.S.2d 969 (1964) aff'd 16 N.Y.2d 652, 311 N.Y.S.2d 306 (1970).)

The availability of declaratory judgment used to be more important at one point in time when it was thought that questions of the constitutionality of a statute or administrative action could not be pursued under Article 78. But now Article 78 has been interpreted to allow suits charging that a statute has been unconstitutionally applied. Questions of the constitutionality of the statute on its face still must be raised by an action for a declaratory judgment. (Kovarsky v. Housing and Development Administration of City of New York, 31 N.Y.2d 184, 286 N.E.2d 882 (1972).) And since Article 78 also clearly applies to questions of administrative discretion, it is the more important of the two available forms of action.

Article 78, Section 7803 provides:

> The only questions that may be raised in a proceeding under this article are:
>
> (1) whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> (2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

(3) whether a determination was made in violation of lawful procedure, was affected by an error or law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

(4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

These provisions define the scope of the court's review of a proceeding brought against a public body. For these purposes the most important paragraphs are (3) and (4), and of these, paragraph (3) is the most important. Paragraph (3) defines the scope of review in proceedings brought to challenge the exercise of discretion and within the paragraph the most important phrase is: "or was arbitrary and capricious or an abuse of discretion."

Subsequent discussions will bring about more sharply the meaning of the phrase "arbitrary and capricious or an abuse of discretion" but it would be useful here to show how this paragraph serves to define simultaneously the authority of the court and the local school district. As previously mentioned, Article 78 and Section 7803 in particular has been interpreted as merely codifying the common law definition of the scope of review. Under a narrow interpretation of the common law, this provision only permits courts to enforce a clear legal right by issuance of a mandamus directed to compel an official to carry out a ministerial duty. (Gimprich, op. cit.) More recently, however, the courts have taken a more liberal view of their authority under Article 78--a view more in keeping with the plain meaning of the words of the statute--and have reviewed actions committed to the discretion of local school districts. (See e.g., Matter of Mandle v. Brown, 5 N.Y.2d 51, 177 N.Y.S.2d 482 (1958).)

But even under this more liberal approach, the courts are bound by the language of Article 78 which clearly allows court intervention only when the actions of the local district (or Commissioner) are "arbitrary and capricious,"

or an "abuse of discretion." What these quoted phrases mean has not been cleanly settled by the courts. The concept of "abuse of discretion" has been taken to have the same meaning as "arbitrary and capricious." Thus the courts seem to have read the conjunctive "or" used in the statute to mean "abuse of discretion" is but an alternative and equivalent way of stating arbitrary and capricious. [Such an interpretation was not necessary as the courts could have read "abuse of discretion" to mean that while the action of the agency was neither arbitrary or capricious, it did trample upon so heavily weighted values as to make the action an abuse of the agency's authority.]

As for the term "arbitrary and capricious" the Court of Appeals in an attempt to codify the interpretation of Section 7803 said in dictum: "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified...and whether the administrative action is without foundation in fact.' [Footnote omitted] Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." (In Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 839 (1974).) Article 78 was strangely interpreted to be a rationality test with an implication that mere disagreement with an administrative agency's policy may be a sufficient basis to overturn the policy. However, other courts have said that mere disagreement on the part of the court with the policy is not a sufficient ground for overturning the policy: the court may not willy-nilly substitute its policy preferences for the local districts. (White v. Board of Education Union Free School District #3, 74 Misc. 2d 171, 344 N.Y.S.2d 564 (1973).)

It is the case that under paragraph (3) the trial courts may try issues of fact de novo. This paragraph in contrast with paragraph (4) assumes no "record" was made by the agency upon which it based its decision and by which the court upon review is now bound. (Matter of Ellis v. Allen, 4 A.D.2d 343,

165 N.Y.S.2d 624 (1957); Iona College v. Nyquist, 65 Misc.2d 329, 316 N.Y.S.2d 139 (1970); CF. Pell v. Board of Education of Union Free School District No. 1 of Town Scarsdale et al, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974).)

Review of facts in the Appellate Division and in the Court of Appeals, however, even under sub-paragraph (3) proceedings, is limited to determining whether there was "substantial evidence." (Pell, supra. p. 839) But even granting itself the authority to review facts in terms of whether there was substantial evidence the Court of Appeals may have given itself more power than the State Constitution allows as Article 6, Section 3 limits the power of the Court of Appeals to the review of questions of law. Presumably determining if an agency action was based on substantial evidence is tantamount to a question of law.

Under sub-paragraph (4) of Section 7803, even the trial court is limited to reviewing whether the agency action was backed by substantial evidence. This sub-paragraph applies to agency decisions involving a hearing in which evidence was taken pursuant to law. The hearing which was required of the agency may have been required by a statute or judicial determination that constitutional due process considerations required such a hearing. (Weinstein-Korn-Miller, N.Y. Civil Prac., par. 7803.12 p. 78-56). In New York, judicially imposed hearing requirements are found when agency action will affect a "property" right as in a proceeding to revoke a license necessary to conduct a business or profession. (Hecht v. Monaghn, 307 N.Y. 461, 121 N.E.2d (1954).) But the relevance of this provision for education is likely to increase as the legislature increasingly requires a hearing to accompany such school actions as the suspension of a student from school (for more than five days (Section 3214(6).)) and as the courts increasingly impose due process requirements on schools when they assign pupils to special classes such as those for the mentally retarded. (Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972);

Pennsylvania Association for Retarded Children v. Commonwealth, 343 F.Supp. 279 (E.D. Pa. 1972).)

Decisions of the Commissioner do not fall within the terms of sub-paragraph (4). (O'Brien v. Commissioner of Education, 4 N.Y.2d 140, Beers v. Nyquist, 72 Misc.2d 210, the court said here the petitioner could not obtain a formal hearing with an evidentiary record as a matter of right from the Commissioner.) A suspension of a principal without pay after a hearing, however, does come within the terms of paragraph (4). (Le Tarte v. Board of Education of Lake Pleasant Central School District, 65 Misc.2d, 147, 316 N.Y.S.2d (1970).)

As noted, under paragraph (4) the scope of review changes. Factual conclusions of the agency may be overturned if not supported by "substantial evidence." (The legislature appears to have intended the definition of substantial evidence to be taken from Stork Restaurant v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940) which in turn relied on several cases decided by the U.S. Supreme Court interpreting the National Labor Relations Act.) Hence, the standard of review seems to permit greater intervention than does the "arbitrary and capricious standard" but in this case the court may not try de novo the factual issues involved in the case: The court is bound by the record made by the agency. In one sense the scope of review is broadened and in another sense restricted. Similarly, the scope of local district authority is affected in a similar, but mirror image pattern.

C. Scope of Review: Commissioner

We turn now to a discussion of judicial supervision of decisions of the Commissioner. The starting point for this discussion is the provision in Section 310 which provides that the Commissioner's decisions "shall be final and conclusive and not subject to question or review in any place or court whatever." The courts have ignored this provision and said they will review

decisions of the Commissioner to determine if they were arbitrary and capricious, or in violation of statutory or constitutional law. (Matter of Ross v. Wilson, 308 N.Y. 605, 127 N.E.2d 697 (1955); and Board of Ed. of City of New York v. Nyquist, 31 N.Y.2d 468, 341 N.Y.S.2d 441, 293 N.E.2d 819 (1973).)

Although no cases were found dealing with judicial review of a Commissioner decision directly affecting school curriculum, several other cases tangentially related to the educational program in schools provide an insight into the relationships between local district, Commissioner and the courts. In Matter of Board of Education of City of New York v. Aller, 6 N.Y.S.2d 127, 188 N.Y.S.2d 515, 160 N.E.2d 60 (1959), the school district and a local college dismissed several faculty members who admitted having been members of the Communist party but who denied present membership and who refused to identify other school personnel as past or present members of the party. Appeals were taken to the Commissioner of Education, who enjoined the schools from seeking to enforce the law by asking teachers to identify other teachers as past or present members in the Communist party; refusal to answer these questions, the Commissioner ruled, was not a proper basis for disciplinary action against the teachers. The schools appealed to the courts and the Court of Appeals said that the issue involved here was one of the proper exercise of discretion and school policy, not a matter of involving a statutorily imposed duty. The Feinberg law, the Court said, did not specify what the proper mode of investigation should be and thus the choice of method of investigation was a matter of policy. On policy matters, the court said, the Commissioner was free to overrule the local districts simply because he favored a different policy than that adopted by the districts and in denying the schools this particular investigatory tool

he neither acted arbitrarily nor capriciously nor did he in effect repeal the Feinberg law. In concluding the Court of Appeals wrote:

> We would stress the fact that we are not passing upon the correctness of the determination of the Commissioner nor are we holding that members of the teaching profession in this State are exempt from citizenship responsibilities imposed not only on all other public servants, but on individuals in private life as well. We are merely discharging our judicial function of interpreting the legislative will. The lawmakers have the right and power to prescribe the Commissioner's powers and to circumscribe our scope of review of his determinations. (p. 142)

Other cases confirm the institutional relationships spelled out in the previous case. In Matter of Vetere v. Allen, 15 N.Y.2d 259 (1965), Negro children through their parents appealed to the Commissioner from a refusal of a local district to alter the zonging areas for school attendance in order to alleviate a heavy concentration of black students in one of the three elementary schools of the district. The Commissioner ordered a reorganization of the attendance areas and parents of white children affected by the order appealed to the courts. The school district was named the respondent along with the respondent along with the Commissioner. The Court of Appeals refused to overturn the Commissioner's decision writing;

> The Commissioner's decision in this case rests squarely on his finding of the inadequacy of such schools from the viewpoint of educational soundness. Since this court had decided that the Commissioner, when a similar policy judgment was made, may substitute his judgent for that of the local board even where the action of the local board was not arbitrary (fn omitted) the decision of the Commissioner in regard to racial balance is conclusive.
>
> 'Disagreement with the sociological, psychological and educational assumptions relied on by the Commissioner cannot be evaluated by this court. Such arguments can only be heard in the Legislature which has endowed the Commissioner with an all but absolute power, or by the Board of Regents, who are elected by the Legislature and make public policy in the field of education. (p. 267)

(Also see Board of Education of the City School District of the City of Mount Vernon v. Allen, 32 A.D.2d 985, 301 N.Y.S.2d 764 (1969) on remand 60 Misc.2d 926, 304 N.Y.S.2d 410 (1969); Spitaleri v. Nyquist, 74 Misc.2d 811, 345 N.Y.S.2d 878 (1973).)

While there are occasions when the courts will overrule a decision by the Commissioner (Board of Ed. of City of New York v. Nyquist, 31 N.Y.2d 468, 341 N.Y.S.2d 441, 293 N.E.2d 819 (1973).), the previously discussed cases provide a strong indication that a Commissioner's decision with regard to the school curriculum is not likely to be overturned, unless so clearly in violation of statutory law or the Constitution as to be virtually no disagreement on the point.

V. Local Districts

A. Board of Education

While school districts are under the control of the state legislature and Board of Regents the courts have given them the opportunity to attack that control by recognizing the standing of school districts to challenge state laws affecting them. In Board of Education v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967) affirmed 392 U.S. 236 (1968), school districts were granted standing to challenge a state statute which required the districts to purchase text books for loan to students in private schools. In permitting the school board to challenge on the ground the law violated prohibitions against the establishment of religion the Court of Appeals wrote:

> "Plaintiff Boards of Education have, as it seems to us, capacity to sue. The cases holding that a public body has no standing to challenge a State statute restricting its governmental powers are not in print * * *. The reasons for this conclusion are adequately stated in the opinion by Special Term and in the concurring opinion at the Appellate Division. These Boards of Education are not seeking to augment their powers by obtaining an adjudication that a statute is unconstitutional which purports to restrict their authority, but, instead, they are asking for a court determination (in the form of a declaratory judgment) concerning whether they are legally authorized to spend public money for purposes purporting to be authorized by this statute. If subdivision 3 of section 701 of the Education Law (as amd. by L.1965, ch. 320, and L.1966 ch. 795) is unconstitutional insofar as it authorizes the purchase of textbooks by school boards for loan to children enrolled in parochial schools, then the school boards would exceed their powers in making such expenditures. Upon the other hand, if that statute is valid, as the State Commissioner of Education has ruled, any disobedient school board

member becomes liable to removal from office (Education Law, §§ 306, 1706) and the Commissioner may withhold public moneys from any district whose school board disobeys the Commissioner's directive implementing the statute."

In another case, districts were implicitly given standing to challenge the Commissioner's refusal to register a proposed new high school. (Carter v. Allen, 25 N.Y.2d 7, 302 N.Y.S.2d 525, 250 N.E.2d 30 (1969).) Elsewhere a district implicitly was given standing to challenge an order of the Commissioner directing the district to reassign students in grades one through six in order to overcome racial imbalance. (Board of Education of the City School District of City of Mount Vernon v. Allen, 32 A.D.2d 985, 301 N.Y.S.2d 764, on remand, 60 Misc. 2d 926, 304 N.Y.S.2d 410 (1969), with holding submission of order, 64 Misc. 2d. 201, 314 N.Y.S.2d 550 (1970).) And in yet other cases, districts implicitly were granted standing to challenge orders of the Commissioner re-drawing district boundary lines. (Board of Education, Union Free School District No. 1, Town of Bethlehem v. Wilson, 303 N.Y. 107, 100 N.E.2d 159; Board of Education, Union Free School District No. 3, Town of Oyster Bay v. Allen, 6 A.D.2d 316, 177 N.Y.S.2d 169, aff'd 6 N.Y.2d 871, 188 N.Y.S.2d 988 (1959), reargument denied 6 N.Y.2d 983, 191 N.Y.S.2d 952 (1959) appeal dismissed 361 U.S. 535 (1960).)

School districts are also free from external constraints that might be imposed by municipalities: even though certain of the large city school districts are fiscally dependent upon the city with which their boundaries coincide, boards of education, the courts have said, have not been made mere departments of municipal government. (Education Law 2578 spells out the nature of the fiscal dependence.) As to "strictly educational or pedagogic" matters, the courts have said the school district as a matter of statutory interpretation must be free of municipal control. This is especially true with regard to the expenditure of funds even though it is the responsibility of the municipality in certain cities to raise the funds for education.

(Divish v. Marshall, 281 N.Y. 170, 22 N.E.2d 327 (1939); Gunnison v. Board of Education of City of New York, 176 N.Y. 11, 68 N.E. 106 (1903); Board of Education of City of Syracuse v. King, 280 A.D. 458; 114 N.Y.S.2d 329 (1952), appeal denied 280 A.D. 1033, 117 N.Y.S.2d 674, appeal dismissed 304 N.Y. 973 (1953); and see Daniman v. Board of Education of City of New York, 306 N.Y. 532, 119 N.E.2d 373 (1954) reargument denied 307 N.Y. 806, 121 N.E.2d 629 (1954, appeal dismissed 348 U.S. 933 (1955), rehearing denied 352 U.S. 950 (1956), cert. denied, 352 U.S. 950 (1956); Sections 1601, 1701, 1804, 2502, 2551.)

Occasionally, however, the courts have found that a matter which appears to be "strictly educational" has been placed within the control of the municipality, even indirectly. In Daniman v. Board of Education of City of New York, op. cit., a group of teachers who were brought before a U.S. Senate subcommittee refused to answer the question of whether he or she was presently or had even been a member of the Communist party. Their refusal was based upon a claim of the privilege against self-incrimination. The Board of Education fired the teachers on the ground it was bound by a provision in the New York City Charter which required the dismissal of any employee of the city who refused to answer the questions of any legislative committee. In seeking reinstatement, one of the issues raised by the teachers was whether this provision of the City Charter applied to them even though their salaries were paid out of city funds and even though the Legislature had declared that an employee of the city was "Any person whose salary in whole or in part is paid out of the city treasury." The teachers stressed that the courts traditionally had said in matters strictly educational or pedagogic the Legislature had kept the schools free of municipal control. The Court of Appeals wrote: "Petitioners are in reality asking us to take the

words used to frame concepts affecting the administration of education in matters strictly educational and pedagogic and to enlarge and expand their meaning so as to include something which transcends matters that are strictly educational and pedagogic..." (p. 543). In short, the court said that in this instance the legislature had determined that teachers were municipal employees for these purposes and were controlled by the city charter, itself a state statute. This was so even though arguably the question of whether a teacher was a member of the Communist party was a matter of educational concern insofar as the threat posed by Communists in the schools was that they would use their position to indoctrinate their students.

The extent of the discretion in curriculum matters enjoyed by Boards of Education is underscored by a brief recitation of the laws empowering the boards to control curriculum: (1) Typically an enabling act gives the board power "to prescribe the course of study" and "to prescribe the textbooks to be used in the schools." (e.g., Education Law 1709); (2) More general provisions provide: "To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes. (E.g., Education Law § 1709 (33).) (3) In addition other sections require that certain courses be taught and certain programs for handicapped children with special needs be offered. (Education Law Sections 801-806, 808-810, 4404) (4) Other provisions, while leaving the decision whether or not to offer the program or course of study up to the school distrct, prescribe the nature of that program if it is to be offered, e.g., bilingual programs if offered, must impart knowledge of the history, and culture associated with the mother tongue of the children. (Education

Law Section 3204; also see 4605.) Finally, we have one curious provision that does not fit the overall pattern. Section 4603 grants permission to school districts to provide non-vocational practical arts courses or to try out exploratory courses in industrial arts, home economics, business and agriculture. Why this provision was necessary if districts have broad implied authority as mentioned above is not clear. If the code is truly permissive this grant is redundant. Only if we assume that the code is restrictive would it seem necessary to add such a provision. Perhaps our only explanation is that the section is an anomaly, or perhaps the section's presence on the books is explained by the second part of the provision which states that the courses listed in the first part shall be classified as general education and not designated as trade, technical or occupational courses. Hence the basic function of the provision is merely to instruct the district as to how such courses are to be classified.

In interpreting school district authority courts have viewed the authority of districts as permissive--that is, the local districts are not limited in their authority only to those powers expressly granted in the statutes, but may exercise those implied powers necessary to carry out the purposes of the districts whether it be with regard to such questions as authority to hire an attorney absent an explicit authorization to do so (Fleischmann v. Graves, 235 N.Y. 84 (1923); authority to hire people for positions in the school system not explicitly created by statute (Richter v. Board of Education, Hempstead, 71 Misc. 2d 571, 336 N.Y.S.2d 330 (1972); or authority to bargain with teachers over matters not explicitly mentioned as subjects of negotiations (Board of Education of Union Free School District, No. 3 of the Town of Huntington v. Association Teachers of Huntington, Inc., 30 N.Y.2d 122 (1972). In the last cited case, the Board of Education raised questions as to its own authority to bargain and bind itself by contract on certain items. The Court of Appeals

after concluding all the items were a "term and condition of employment" hence covered by the state's collective negotiations act, turned to the question of whether absent a statutory provision expressly authorizing the board to provide for a particular term or condition of employment, it is prohibited from doing so. The Court of Appeals answered by saying the state's collective negotiations act which imposed upon the district the obligation to negotiate over terms and conditions of employment could only be limited by express and definitive prohibitions barring the district from making such an agreement. To rule otherwise, the Court said, would destroy collective negotiations. "Public employers must, therefore, be presumed to possess the broad powers needed to negotiate with employees as to all terms and conditions of employment." (p. 130)

An important exception to the courts' willingness to interpret the authority of local districts liberally is to be found in an Appellate Division case dealing with the question of who has authority to determine a "tenure area." In Baer v. Nyquist, 40 A.D.2d 925, 338 N.Y.S.2d 257 (1972) the petitioner had served one year in the district as a teacher of general science and then, at his own request, was assigned to social studies which he taught for over two years. Petitioner was then informed he had not been granted tenure. He appealed the decision to the Commissioner on the ground he had served in the district for more than the three-year probationary period provided by statute and, thus, had acquired tenure upon completion of his third year. The Board argued it had established four tenure areas--English, Science, Mathematics, and Social Studies--and that petitioner, because he transferred from Science to Social Science, had not served three years in any tenure area. The Commissioner upheld the school district saying that tenure areas were established by the local district and not by the Commissioner or the courts. The Appellate Division reversed the Commissioner. The court said that Education Law Section

3012 merely creates the concept of tenure without reference to a tenure area and that as interpreted by the Court of Appeals in Becker v. Board of Education, 9 N.Y.2d 111 (1961), the notion of "area tenure" referred to tenure at "certain grade levels--elementary, secondary, kindergarten, industrial arts, etc., and also to certain specified subjects including 'physical education, music, art, and vocational subjects.'" (p.925-6) If there is a need for narrower tenure areas, the change may only be brought about by legislation or by the Board of Regents acting pursuant to Section 207 of the Education Law.

The effect of the decision on local district discretion is not sifnificant now that districts have been clearly warned that teachers who have served a total of three years in the system are eligible for tenure even if they shifted between the tenure areas as defined by the board. In fact the broad definition of what constitutes a tenure area works to the district's advantage in implementing its curriculum: teachers may be involuntarily shifted around to suit the educational needs of the district within these broad areas. (Discussed below.)

The troubling aspect of the decision is that it does not articulate why this power to define tenure areas is not one subject to school district control. Indeed, one might have expected that the courts would grant local districts the authority to determine tenure areas since the courts have said the tenure statutes are in derrogation of the common law and must be strictly construed. As a consequence, in the absence of the tenure law the local districts would have had wide discretion over the hiring and firing of teachers and the tenure law must be construed to minimize the impact upon that wide discretion. But since the court ignored this line of reasoning, we must search for other factors that compelled it in a different direction.

Perhaps the point is that the court did strictly construe the tenure law and read it as a clear legislative attempt to provide job security to teachers. Even strictly construed, the law must be read to remove that discretion from local districts which tends to undermine teachers' job security. Local discretion on this matter would undermine the legislative policy of providing job security for teachers. In any event, the case represents one of the few cases that tends to constrict rather than broaden local district authority.

An important consequence of the generally liberal interpretation of school board authority is that districts are given concurrent authority with the Board of Regents and Commissioner over many aspects of educational policy. Thus in the area of curriculum, the Board of Regents and Commissioner have authority not only to promulgate minimum standards but also to specify the precise nature of the courses to be offered. (Education Law Sections 800ff, 3204, 4401ff). At the same time, the local districts have authority to add courses, fill in the details with regard to required courses, and impose more stringent course requirements than those imposed by the state. In other words, the doctrine of preemption has only limited applicability in the curriculum area. The legislature we can say appears clearly not to have intended to preempt control of the curriculum in contrast with the finding in the Baer v. Nyquist case discussed above. That case might be read that with regard to tenure the legislature has preempted the area, thereby ousting local districts of any authority except to carry out the provisions of the statutes. The distinction between the two areas may make some sense if explained the following way. One reason for local control of education is to promote differences between districts in the kind of educational program offered; if the preemption doctrine were found to applicable to curriculum policy that would undermine

local control. With regard to tenure, however, requirements of fair and equal treatment of teachers point to the need for a uniform statewide policy on the issue.

The discussion now turns to five issues touching upon the scope of local district authority over the curriculum: (1) Selection of Courses. (2) Selection of Methods of Instruction. (3) Restraints on Curriculum Innovation. (4) Authority to Compell Students into Courses and Programs. (5) Neutrality and Indoctrination. (6) Accultration.

(1) Selection of Courses. The state's minimum course requirements provide no real obstacle to local control over the curriculum. First, additional courses beyond the minimum can be added, subject to the financial ability of the school district. Second, districts can design their own Regents' courses by substituting their own exams for the Regents' exams and courses upon approval of the Commissioner and his Examinations Board. (Board of Regents, Reg. 3.35(b) and 8.1.) And, as noted above, the Commissioner encourages and will allow curriculum adaptations.

What is less clear is how far districts may go in adding courses to the program without getting the prior approval of the Commissioner. For example, may schools grant credit toward graduation for study and work done off the school grounds either at a place of employment or as part of a released time program? (Released time programs are authorized by statute, Education Law 3210(2)(b). The Regulations limited the time away from school to one hour per week per pupil. Reg. 109.1(e). Work-study programs are also permitted, Education Law Section 4606.) As noted in the regulation quoted above, the Commissioner has reserved to himself the power of prior approval of curriculum changes. This claim of the right of prior approval has not been challenged in the courts and whether such a challenge would succeed is not clear from the

cases. In Matter of Carter v. Allen, 25 N.Y.2d 7, 302 N.Y.S.2d 525, 250 N.E.2d 30 (1969), a school district challenged the refusal of the Commissioner to register its proposed new high school. The Commissioner refused because he said establishment of the high school would conflict with his plans for district reorganization. The Court of Appeals overturned the Commissioner's decision (and a related regulation) on the ground he had no express statutory authority to refuse to register a high school for this reason. The Court said the legislature had specifically spelled out all the ways the Commissioner could try to promote compliance with approved plans for district reorganization and the Commissioner could not add this tool to his toolbox. Thus, the court seemed to be saying that since the legislature spelled out in detail the tools available to the Commissioner, it could not be presumed the legislature intended to leave it to the Commissioner to devise new tools. In the curriculum area, however, the legislature has not specifically provided what the Commissioner and Board of Regents may or may not do. A broad grant of authority has been given without more. Hence, a court might conclude that the legislature did intend in this instance to leave it to the Commissioner's discretion as to whether or not prior approval of curriculum changes would be required. Another consideration points to the opposite conclusion: since the legislative grant of authority to local districts is so broad, it suggests the legislature did not contemplate as close control of local districts as the Commissioner seeks. It would seem that the right of the Commissioner to disapprove curriculum after-the-fact would be more consistent with a statutory scheme that places great weight upon the value of local control.

Only if courses are controversial, however, are school districts likely to be challenged as to the propriety of adding a course to a school program. A search has turned up no New York cases in which a course was challenged, hence, we can only speculate as to the likely outcome of such a challenge. [A discussion of the likely outcome of a challenge based on constitutional grounds, e.g., First Amendment, will be reserved for the section on the Constitution.] For reasons which follow, it seems unlikely any petitioner could succeed with a non-constitutional attack except in the most bizarre of circumstances.

First, the standard of review employed by the courts and the Commissioner--was the district action arbitrary and capricious--places on the petitioner the burden of coming forward with the evidence. (Matter of Appeal of Lee A. Reed, 1 Educ. Dept. Rep. 488 (1960).) Secondly, the board need not have acted perfectly rationally, it need only not have been so irrational as to have acted arbitrarily and capriciously or abused its discretion. Thus the standard makes it unlikely either court or Commissioner will find a district has acted improperly.

The way in which the standard of review favors the school district emerges more clearly once we realize the district is free to explain or justify its selection of courses in light of any educational objective that does not violate constitutional proscriptions. For example, if a district decides to include basket weaving in the curriculum it could easily reply by way of justification that the course was designed to serve the purpose of bringing the students in touch with the technology of an older America. There is no reason to suppose that either a court or the Commissioner would disallow such a goal on the part of the school district. For a court to do so would involve it in imposing its own conception of the proper goals of education upon the school district as the district could argue in support of this goal that it was chosen

in light of the larger goal of producing educated citizens. It would be extremely difficult without simply imposing its own education philosophy for a court to say that the original objective of bringing students in touch with the technology of an older America did not serve the larger goal of producing educated citizens. (Cf. John Hart Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 Yale L.J., 1207 (1970).)

If the petitioner were to attack the basketweaving course on the theory it did not in fact contribute to the school district's own goal, it is doubtful he would have much success with this strategy either. Indeed, how could the petitioner refute the claim that learning basket weaving did contribute to bringing students in touch with the technology of an older America? And the position of the petitioner would become even more untenable if the school district were to argue that the ultimate goal to which the basketweaving course was directed was "the education of children." Given this broad goal there is no way the court or Commissioner could apply a standard of rationality and conclude the course failed to be related to the objective and the district acted irrationally.

What really would be at stake here would be a claim on the part of the petitioner that another course, e.g., history of science and technology, would to a greater extent contribute to the goal. While the court and Commissioner might agree, they could not deny that basketweaving also did contribute to achieving the goal. The standard of review does not require, however, that a local district choose the course most closely related to the objective. In reality, the only way the court or Commissioner could overrule the district would be to impose an alternative conception of what an educated person is

upon the district. This sort of decision is not, however, what the Commissioner's own self-imposed standard of review permits. Hence, the only kind of course that would be struck down on non-constitutional grounds is one so utterly frivolous--without any redeeming social value?--that everybody would agree it has no relationship to the function of schools as a place where children "may be educated." A course which instructs children, who already know how to count, how to go about counting blades of grass in a park might fall within such a category. Such a course would neither instruct nor delight - would involve children in nothing anybody would call a worth-while activity under any kind of standard. [There is a related issue here of the power of the school district to compel a particular child to take a particular course or program. This question will be taken up in detail below.]

Another serious problem arises when a district refuses to offer a course a student would like to take. But a challenge for failing to offer a course can also be easily met by a district. Schools have limited resources and cannot offer every possible course students may wish offered and when challenged on its unwillingness to offer, for example, Sanskrit while it does offer modern French, a district could simply reply that its concept of the educated person includes knowledge of French but not of Sanskrit. There is no way the court or Commissioner could say such a choice was arbitrary and capricious or an abuse of discretion unless it was prepared to substitute its judgment for the district's. (See Matter of Feldheim, 8 Educ. Dept. Rep. 136 (1969) in which the Commissioner refused to force the school district to implement a plan the district had proposed for consideration involving the admission to grades kindergarten through two of disadvantaged children from nearby areas of New York City.)

There is one area where a challenge to the school district for failure to offer a course--other than failure to offer a course required by statute--may have a chance of success: bilingual education. Section 3204(2) as recently amended requires that English be the language of instruction "except that for a period of three years, which period may be extended by the Commissioner with respect to individual pupils, upon applications therefor by the appropriate school authorities, to a period not in excess of six years, from the date of enrollment in school, pupils who, by reason of foreign birth, ancestry or otherwise, experience difficulty in reading and understanding English, may, in the discretion of the board of education, board of trustees or trustee, be instructed in all subjects in their native language and in English..." (Laws of New York 1974, Chapter 1052). Another section added to 3204 in 1970 which empowers the board to determine if bilingual instruction is necessary adds that boards shall develop the capacity to offer bilingual-bicultural programs. (Education Law, 3204 (2)(a).)

The statute thus leaves unsettled the issue of whether boards must or merely are empowered to provide bilingual education. But if we turn to another statutory provision we find that once again the language is permissive:

Section 4404(7):

> The board of education of each union free, central or city school district in which there are ten or more non-English speaking children may establish such special classes as may be necessary to provide instruction adapted to such children under rules to be established by the commissioner of education.

Thus it appears N.Y. districts are not required to provide bilingual instruction.

If a district does not offer a bilingual program or any other form of special instruction to provide non-English speaking students with assistance to learn English, a case might be made based on Article II, Section 1 of the

State Constitution that these students are being denied their right to an education. Students who cannot speak or understand English and who are provided instruction only in English may be considered effectively denied a public education in violation of the obligation of the legislature to provide free common schools in which children "may be educated." (Also see Lau v. Nichols, 39 L. Ed. 2d 1 (1974) for another approach to this issue under the Civil Rights Act of 1964; and Aspira of New York, Inc., v. Board of Education of the City of New York, 58 F.R.D.62 (S.D.N.Y. 1973).)

(2) Selection of Methods of Instruction. Neither the statutes, Regents nor Commissioner's regulations, nor the official syllabuses for courses issued by the department of education mandate any particular method of instruction, set of materials or textbooks. A choice on these matters is within the scope of school district authority and challenges to the school must be based on a charge the choice was arbitrary and capricious. In other words, the complaint must charge that the methods selected do not in fact serve the ends of the district and do not benefit the students.

The courts may be more receptive to such an attack than one which raises questions as to the legitimacy of an entire course. An attack of this sort only questions the efficacy of the means of instruction in a given course and raises a question of fact--does the method of instruction in fact achieve its purposes and benefit the child?--rather than question of the choice among alternative aims or purposes of education. But because even this question of fact is itself not easily resolved--a given program may have many different and unmeasurable effects claimed for it by the district--we cannot expect swift and frequent judicial intervention. Intervention is only likely to occur in the clearest cases of program failure, e.g., provision of mere custodial care for the mentally retarded when it is known that some kind of care would

be of benefit to the children. (Cf. Wyatt v. Strickney, 384 F.Supp. 387 (M.D. Ala. 1972), enforcing 325 F.Supp. 781 (M.D. Ala. 1971) in which under the Due Process clause of the U. S. Constitution it was ordered that mentally retarded people could not be deprived of their liberty without the provision of something more than custodial care. If the compulsory attendance laws coupled with a virtual public monopoly on the provision of schooling are deemed to create conditions functionally equivalent to the involuntary institutionalization found in Wyatt, then perhaps we have the basis for a due process challenge to public school programs which are really non-programs for the mentally retarded child. Government must choose between treating children and letting them go.)

The conclusion that courts may be receptive to such a line of attack is based not so much upon a review of how courts have interpreted the standard of review embodied in Article 78, but upon the fact that a concern with the effectiveness of methods of instruction is established state policy. Throughout the statutory code one can find references to the legislative concern with adequate instructional methods. Section 4404(4) provides:

> The board of education of each school district shall cause suitable examinations to be made to ascertain the physical, mental and social causes of such failures or 'under-achievement' of every pupil in a public school, not attending a special class, who has failed continuously in his studies or is listed as an 'under-achiever.' Such examinations shall be made in such manner and at such times as shall be established by the commissioner of education, to determine if such a child is incapable of benefiting through ordinary classroom instruction, and whether such child may be expected to profit from special educational facilities. The commissioner of education shall prescribe such reasonable rules and regulations as he may deem necessary to carry out the provisions of this paragraph. (Emphasis added.)

In the provisions dealing with the handicapped, districts are expected to provide services "adapted to the mental attainments and physical conditions of such children." (Section 4404(2)(a).) Other sections also contain references to the same concern: If it can be shown that a pupil cannot benefit

from instruction he may be exempted from the compulsory education laws altogether. (Section 3208(2).) And yet other provisions, discussed at some length below, provide that parents of certain kinds of handicapped children may obtain state support for private education if the local district in which the student resides does not provide services which may benefit the child.

Further support is provided by an examination of the Commissioner's regulations. The regulations provide that the school program must be organized to take into consideration the individual interests and abilities of students (Reg. 100.1(b)(d)). As for high schools the regulations provide:

> (c) The efficiency of instruction, the acquired habits of thought and study, the general intellectual and moral level of the school are paramount facets in determining its standing. Only schools which rank high in these qualities, as shown through competent, sympathetic inspection, as well as through the provision that is made for meeting individual pupil and group needs, should be considered eligible for full high school grade.
>
> (d) A sufficient number of qualified teachers must be provided to care adequately for all instruction offered. An approved high school shall have a salary schedule which is sufficient to secure teachers with proper qualifications.

These provisions suggest that, while New York state has not explicitly established that districts must reach a minimum level of achievement with their students, the legislature has gone beyond merely requiring that districts need only provide the minimum course offerings. The district concern for pupils must be more active and arguably must adhere to the following criteria: (1) Districts must make a bona fide effort to identify the background factors which bar effective student utilization of school services and facilities and must make an effort to develop individualized instruction; (2) The district must assure the instruction being offered is adequate in light of existing knowledge and can reasonably be expected to be of benefit to the student; (3) The district must assure that the programs are adequately staffed and funded.

(4) And the school must continuously upgrade the diagnosis of the students and make constant efforts to assure that the program is suited to that student's particular needs and abilities.

In sum, at least in New York, because of the standard of review imposed upon the courts by the legislature and the legislative concern with the effectiveness of public instruction, a basis seems to exist for seeking judicial review of the efficacy of school instruction. There is no guarantee of success, but New York law does offer possibilities that are not available in the other states studied except California.

The discussion has been dealing broadly with methods of instruction, and now turns to a specific subject, textbook selection. School districts have been given general authority to select textbooks. (e.g., Education Law §1709 (4).) All districts are subject, however, to the requirements of Section 704 which prohibits books that "contain any matter or statements of any kind which are seditious in character, disloyal to the United States or favorable to the cause of any foreign country with which the United States may be at war." A commission has been established by this section consisting of the Commissioner of Education and two people chosen by the Regents to examine textbooks in the subjects of civics, economics, English, history, language, and literature which have been challenged under the standard just quoted. If the challenge is upheld the school district may no longer use the book, and any contract for the purchase of the book become void. A criminal penalty attaches to the violation of these provisions. (Section 705)

Official complaints have only been brought in a handful of cases and in each instance the textbook commission upheld the school district. The law itself and the challenges to the law seem largely to stem from the period when the Cold War was at its coldest. (Opinions cited above.)

Challenges to school textbook policy have also been brought to the courts. In Rosenberg v. Board of Education of City of New York, 196 Misc. 542, 92 N.Y.S.2d 344 (1949), petitioners challenged the use of Oliver Twist by Charles Dickens and The Merchant of Venice by William Shakespeare in the secondary schools because the two books tended to "engender hatred of the Jew as a person and as a race." In response the Board explained that in the use of the books the school district required teachers to explain to pupils that the characters described were not typical of any nation or race and are not to be regarded as reflecting discredit on any race or national group. The Court dismissed the petition finding no abuse of discretion. The school district, it was found, "acted in good faith without malice or prejudice."

> Except where a book has been maliciously written for the apparent purpose of promoting and fomenting a bigoted and intolerant hatred against a particular racial or religious group, public interest in a free and democratic society does not warrant or encourage the suppression of any book at the whim of any unduly sensitive person or group of persons, merely because a character described in such book as belonging to a particular race or religion is portrayed in a derogatory or offensive manner. The necessity for the suppression of such a book must clearly depend upon the intent and motive which has actuated the author in maing such a portrayal.

The last quoted sentence of course makes little sense as a standard for court review of school district book selection since it is impossible to determine the intent and motive with which authors limned their characterizations. Assessments of that sort are the subject of endless unresolved disputes among literary scholars. Besides, while a book might have been written for an offensive purpose, the way the book is used in the school would seem to make the difference as to whether the author's intent is carried out. Similarly, the mis-use of well-intentioned books can lead to the service of educational ends never dreamed of by a book's author.

But the court does appear to be on the right track when it chooses to tackle the problem in the case as one of the motivation of the school district. One could argue in a non-constitutional challenge under Article 78 to the selection of books which had been motivated by a desire to belittle Jews that this was not a sound educational objective, hence the decision was arbitrary and capricious. Indeed, an educational program with such an element runs counter to what the schools in New York are all about if we take seriously the New York legislature's concern with an educational program which may be of benefit to the children. Further, any such educational program would affect interests of the children which are recognized by the Constitution. The belittling of the Jews does move the schools into the position of seeming to give support to all non-Jewish religions; it does chill the willingness of Jewish children to express their religiosity as Jews; does present these children with materials that at best provide negative reinforcement for their religion and culture while giving other non-Jewish children positive reinforcement--clearly unequal treatment of the two groups. Finally, we would have in such a situation, government forcing a captive audience to listen to offensive materials, thereby invading the minds and personalities of these children in a way that seems to trample on their legitimate desire not to hear and their rights of privacy. Any program intended to do all these things could hardly be called "educational" in the normal use of the term, and seems basically inconsistent with the purposes of the educational system as established by the legislature in New York.

Another case in the Second Circuit Court of Appeals touches upon the problem on the other side of the Rosenberg coin, namely, the refusal of a school district to use a specific book. In this case, Presidents Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (2 Cir. 1972) the local Board

at first ordered all copies of Down These Mean Streets by Piri Thomas removed from all junior high school libraries and then changed the order to provide that the book could be kept at those schools which previously had the book in their libraries but it would only be available on a loan basis to the parents of the children attending the schools. If the parents then wanted to loan the book to the children, that was their business. The book, the Court noted, recounted the story of a Puerto Rican youth growing up in Spanish Harlem in New York City and was replete with criminal violence, sex, normal and perverse, episodes of drug shooting, and four and twelve letter obsenities. The plaintiffs, an organization of past and present presidents of various parent and parent-teacher associations claimed the Board's decision violated their First Amendment rights, as well as those of teachers, parents, librarians and children, but the Court disagreed. The book could still be discussed in the classrooms and any impact on First Amendment rights of parents, teachers, students or librarians was at best "miniscule." Besides, the Court noted, selection of books was a matter the judiciary had just as well stay away from and to intrude here and bar the district from controlling the use of the book after it once had been openly available on the shelves in the library would create a right of tenure for books merely by having been shelved.

Finally, in Matter of Daniel Kornblum, 70 State Dept. Repts. 19 (1949), the publishers of a magazine entitled "The Nation" sought review before the Commissioner of the decision of the Board of Education of the City of New York to discontinue listing the publication as approved for purchase by high school libraries. The petitioner's argument was not that the board had abused its discretion in excluding this particular publication, but that the board did not have the authority to promulgate an exclusive list of periodicals approved for high school libraries. The Commissioner ruled against the publisher

saying school boards had a duty to establish some mechanism of screening which magazines would be available in its libraries. And certainly the Commissioner was correct in this conclusion. School districts have not been required by law to subscribe to every magazine which is published, hence some selection is necessary, and permissable.

After so concluding the Commissioner continued:

> Nor can a board's refusal to subscribe for a given periodical, whether or not it has previously subscribed for it, be properly regarded as an infringement of constitutional guarantees. The principle of freedom of the press applies to the right of publication; it does not impose on boards of education, which stand in loco parentis, any more than it imposes on parents, an obligation to purchase or accept any particular publication for the children in their charge. In the absence of specific statutory requirements, the principles of due process and of equal protection of the law similarly do not place upon a board of education an obligation to purchase or accept a particular publication. (p. 20)

Undoubtedly the Commissioner is correct that boards of education do have the authority to establish lists of acceptable publications, but the Commissioner may have spoken without sufficient analysis when he said that the First and Fourteenth Amendment afford a publisher no protection against the exclusion of his publication from the school libraries. For example, the magazine in question appeared to be a Catholic publication; if the district continued to accept a Protestant publication but discontinued the Catholic publication a student could claim denial of Equal Protection of the law insofar as he as a Catholic was denied access to Catholic publications while the Protestant students were given access to Protestant publications. (Cf. Jackson v. Godwin, 400 F.2d 529 (5 cir. 1968).) The publisher and student might claim in addition that such a policy amounted to an abuse of discretion, since the motivation behind such a policy would appear to be anti-Catholic. That is, the selection of publications by the school was arbitrary, being based on non-educational considerations.

(3) Constraints on Innovation. There are few obvious constraints on the authority of school districts either to add or to refuse to add courses to the school program. Having decided to make changes in the program, however, a district does face a variety of other constraints. With regard to the simple matter of changing textbooks, Section 702 provides:

> When a text-book shall have been designated for use in a school district or city as provided in subdivision one of section seven hundred one, it shall not be lawful to supersede such textbook by any other book within a period of five years from the time of such designation, except upon a three-fourths vote of the board of education, trustees or such body or officers as performs the function of such board.

For these purposes a textbook is defined as a book or "book substitute, which shall include hard covered or paperback books, work books, or manuals which a pupil is required to use as a text, or a text-substitute" in a class or program. (Chapter 44, Laws of New York, 1974.) This broad definition of a textbook clearly inhibits school district flexibility in changing its program.

The ability to innovate is also importantly affected by the degree to which school districts have authority to control staffing patterns. First, the authority of school districts to abolish positions has been recognized in statutes and cases. (Beers, v. Nyquist, 72 Misc.2d 210, 338 N.Y.S.2d 745 (1972). Also see Section 2585(2) and (3).) This fact gives the districts a certain amount of flexibility: by eliminating old programs and teaching positions resources can be released to mount new programs.

Districts also have the authority to create new positions which may have attached to them unusual qualifications. In Council of Supervisory Associations Associations of Public Schools of City of New York v. Board of Ed. of City of New York, 23 N.Y.2d 458, 297 N.Y.S.2d 547, 245 N.E.2d 204 (1969), remittur amended, 24 N.Y.2d 1029, 302 N.Y.S.2d 850, 250 N.E.2d 251 (1969), the school board created a new job category, "Principal, Demonstration Elementary School"

and made three temporary appointments pending the final development of relevant criteria to be tested in a competitive examination for purposes of permanently filling the positions. The background to the creation of these positions was as follows: according to all standardized tests of basic skills, traditional public school teaching had not succeeded with the consequence many Negro and Puerto Rican children remained in poverty; the alienation of these communities increased and demands were raised to change the teaching methods in the public schools. Experimentation was needed and pursuant to a recently passed statute encouraging New York City to develop programs with greater community participation, the city district established several demonstration projects based on a concept of decentralization and parental and community involvement. With the approval of the Commissioner, the Board created the new job category to be filled from a special eligible list which would consist of names of people who had taken a special exam yet to be designed. Meanwhile, the positions were temporarily filled but the successful candidates' names were not taken from the regular eligible list used for filling principalships in the district. The creation of the positions as well as the appointments were challenged as an abuse of discretion, a violation of the anti-race discrimination provisions of the New York Constitution, and as a violation of Article 5, Section 6 of the State Constitution which requires the use of criteria of merit for filling civil service positions. The Court of Appeals dismissed the petition.

As for the issue of abuse of discretion, the Court noted that the district had decided that these demonstration projects required a principal to run a more community-centered school than had ever been run before, hence the need for a new job category and the justification for not using persons on the present eligible list who had not been examined for this added experience. Besides, the temporary appointees each held state certification to be a principal.

As to the charge of racial discrimination, the court said race was not the basis for the appointments. The men picked for the jobs each had demonstrated experience of community involvement and participation with the ethnic group with regard to which there was an educational problem. The criteria used was objective, measureable, and relevant to the nature of the demonstration projects. The court refused to anticipate what criteria would be used for making permanent appointments. Finally, as to the need for a competitive approach to civil service appointments, the court said the argument "answers itself." In final comments, the court noted "If no new position could ever be created, the civil service would be frozen into immobility; and if temporary appointments could not be made, progress would be impeded...The experimentation which is the basis of this proceeding may not solve the problem. But it is not being solved by rigid adherence to past techniques. The Legislature and the responsible education officers of the State and city have seen experimentation as a possibility of improving the education of children in slum areas. This court ought to give it a reasonable chance of success." (pp. 468-69)

Antell v. Board of Education of City of New York, 21 Misc. 2d 119, 195, N.Y.S.2d 959 (1959) aff'd 10 A.D.2d 699, 199 N.Y.S.2d 428 (1960), raises a related problem. Sixteen teachers who were about to complete five years of teaching complained of a sudden change in the eligibility requirements for the license of assistant principal. The new requirements provided that two of the five years of teaching must have been in schools classified by the superintendent as presenting unusually difficult problems of instruction, guidance and administration. The teachers attacked the rule as arbitrary and capricious arguing it merely represented an effort by the district to assure a supply of teachers to these difficult schools. Without citing evidence, the court said the district did not need the change in order to obtain

teachers for these special schools, hence the court accepted the school district's explanation that the requirements was added to assure that people who took over positions of leadership in the system had "reasonable knowledge of both the clinical and academic phases" of the problems in the schools.

Teaching certificates pose another potential restraint on curriculum innovation: districts are prohibited from employing or authorizing to teach any person who does not hold a teacher's certificate (Section 3001), the issuance of which is under the control and regulation of the Commissioner. Section 3006(4), however, provides that the Commissioner may issue:

> A temporary certificate to a school district upon the request of the school authorities of the school district, and under such rules as the regents shall establish, which shall authorize such school authorities temporarily to employ persons having unusual qualifications in specific subjects, as visiting lecturers, provided they have been licensed pursuant to subdivision five of this section, so as to supplement the regular programs of teaching of such specific subjects.

Under this provision a lawyer might be hired as a visiting lecturer to teach in the public schools. The door is open a small crack for school districts to make use of the human resources in the community in order to supplement the regular school program. (See Regs. 80.33(c) and (d).) And section 4606 also provides districts with authority to make use of community resources by establishing part-time school and part-time employment programs for students over 15 years of age, the so-called work-study programs.

As for school district flexibility in the use of the regular teaching staff, several provisions of the Commissioner's Regulations give the boards some assurance on this score. Provision 80.2(d) provides: "A superintendent of schools, with the approval of the Commissioner of Education, may assign a teacher to teach a subject not covered by his license for a period not to exceed five classroom hours a week." The validity of this regulation has been brought into question in a lower court case. (Jacobson v. Board of Education

of New York City, 177 Misc. 809,31 NYS2d 725 (1941), modified 365 A.D. 837, 37 N.Y.S.2d 647, appeal denied 265 A.D. 935, 39 N.Y.S.2d 416 (1942) ; and see Sokolove v. Board of Education of the City of New York, 176 Misc. 1016, 29 N.Y.S.2d 581 (1941).) There the court struck down as unconstitutional the assignment of teachers to teach Spanish who were not specifically licensed in Spanish. The school district argued its policy was merely an extension of the above quoted regulation even though in this case permission had not been sought from the Commissioner. The court said that the regulation was not before it in this case, but that if it were it also would be unconstitutional insofar as it violated Article 5, Section 6 which requires all appointments be "made according to merit and fitness to be ascertained, so far as practicable, by examinations, which so far as practicable, shall be competitive." (p. 811-812)

But it may not be necessary for a school district to resort to the above regulation in order to make the most effective use of the available teaching staff. For example in the case of Matter of Appeal of Chester Gusick (4 Educ. Dept. Rep. 57 (1964).) a licensed health education teacher was assigned to lecture on driver education five periods a week without the prior approval of the Commissioner. The teacher appealed the assignment to the Commissioner who sustained the board on the grounds that (a) driver education merely represented an extension of the subject matter of a regular health curriculum and (b) the teacher was not required to take any additional courses in order to be able to teach the topic.

Additional flexibility is provided under Regulation 80.2(h) which allows a school district to employ a certified teacher "for any teaching assignment" for a period of five years when the teacher is involved in an experiment concerned with organization changes that alters the definition of the elementary, junior or senior high school. The assignment can also be renewed for an additional five years with approval of the Commissioner.

Teachers also may be assigned to certain non-teaching duties which are related to the educational function of the school such as directing plays and being placed in charge of extra-curricular activities. (Parrish v. Moss, 200 Misc. 375, 106 N.Y.S.2d 577 (1951) aff'd 279 A.D. 608, 107 N.Y.S.2d 580 (1951).) In one case, a mathematics teacher was assigned full time to study hall duty and the courts upheld the board's action. (Van Heusen v. Board of Education of City of Schenectady, 26 A.D.2d 721, 271 N.Y.S.2d 898 (1966).)

(4) Assignment of Pupils to Courses, and Programs. The authority of districts to devise special programs for different children has been discussed above and now we turn to the authority of districts to compel students into and to exclude students from programs. The discussion begins with the school district's authority over the handicapped.

The most specific laws dealing with ability grouping are to be found in the set of statutory provisions directed to the education of the handicapped, delinquents, and under-achievers. Local districts are obligated when 8 or more , depending on the handicap, pupils or delinquent pupils are enrolled in the system to provide them with special classes so as to "provide instruction adapted to the mental attainments and physical conditions of such children." (Section 404(2)(a).) (Other arrangements are to be made for handicapped students if there are less than ten. If there are less than ten delinquent students the statute requires no special action by the district.) The Commissioner's regulations define a "special class" as a "class containing handicapped children who have been grouped together because of similar educational needs for the purpose of being provided a program of special education under the direction of a specially trained teacher." (Reg. 200.1(d).) Other provisions of the regulations establish further specifications for different kinds of special classes for children with different handicaps and other problems.

The degree to which handicapped children may be separated from the regular school program is touched upon in Reg. 200.3(a)(2):

> Where the handicapping condition does not preclude functional participation in activities with non-handicapped children special classes shall be located in public school buildings where there are classes of regular grade children of similar chronological ages in order to promote integration of handicapped children into regular school activities. Adequate classroom space, facilities and equipment shall be provided for each special class.

A "position paper" from the Board of Regents adds this comment:

> The quality of many publicly operated or supported educational programs is related to the degree to which children with handicapping conditions are grouped or otherwise combined effectively with other children in the mainstream of our schools and society. These children deserve opportunities to share educational experiences with children in regular classes in groupings for physical education and music, in cafeteria and assembly, and in other ways and places throughout the everyday school program. Social exchange with other students in the school is vital to aid such children to establish and maintain healthy self-esteem. Opportunities for interaction with the total school environment should be accorded a very high priority in planning for handicapped children. (Position Paper #20, The Education of Children with Handicapping Conditions, Statement of Policy and Proposed Action by the Regents of the University of State of New York, p. 6-7.)

Despite these statements, the reality of the situation is that handicapped children in special classes are largely separated from the mainstream either by being isolated in special classes located in rooms removed from the regular classroom arrangements or in special schools devoted to the education of the handicapped. Local districts are rather free of any meaningful state control in carrying out these programs. Indeed, a recent case demonstrated that districts are lax about fulfilling their duties toward the handicapped. In that case, the Commissioner ordered a stop to practices that denied 24,000 handicapped pupils the services to which they were entitled. For example, some of

these students had been simply "excused" for medical reasons from the requirements of the compulsory education laws and others were illegally given home instruction exclusively. (In Re Reid, Commissioner Decision #8742, 11/26/73).)

But the extent of school board authority with regard to grouping students homogenously is extended by the fact that the districts have both wide and largely unsupervised discretion as to which student will be assigned to which instructional group. First, with regard to the handicapped, while school districts have certain duties toward the handicapped they have no duty to obtain parental permission before assigning a student to a special class. (Opinion of Counsel, #45, 1 Educ. Dept. Rep. 744 (1951).) Indeed, neither statutes nor regulations require districts even to consult with a parent before assigning a pupil to a special class. The only obligation on the part of the district with regard to assigning a pupil to a special class is that:

> Each school district shall provide for each handicapped child a physical examination consistent with the provisions of section 904 of the Education Law, an individual psychological examination by an approved psychologist, social history, and other suitable examinations and evaluations as necessary to ascertain the physical, mental and emotional factors which contribute to the handicapping condition. Any other mateiral pertinent to the child's learning characteristics shall be reviewed and evaluated. (Reg. 200.2(A).)

Thereafter a special committee consisting of a qualified school psychologist, a teacher or administrator of special education, a school physician and others are to review and evaluate at least annually the status of each handicapped pupil apparently with a view only to making an annual report to the Commissioner. (Reg. 200.2(b).) A later section indicates that each child is to be re-examined at least once every three years, apparently for the purpose of

determining the appropriateness of his placement in the special class. (Reg. 200.2(B)(3).) Although neither the statute nor the regulations say anything about how a parent might challenge the fact that his child has been placed into a special class, we can assume an appeal lies first to the Superintendent and then most certainly to the Commissioner. At such hearings it would appear that parents can bring their own experts to testify. (Madera v. Board of Education of City of New York, 386 F.2d 778 (2 Cir. 1967), cert. denied 390 U.S. 1028 (1968).) In any event, a parent must be allowed to see his child's permanent record to see the evidence upon which the district based its decision to assign their child to a special class. (Van Allen v. McCleary, 27 Misc.2d 81, 211 N.Y.S.2d 501 (1961).) An appeal to the courts is also certainly possible after having exhausted one's administrative remedies by seeking review from the Commissioner. (Realty v. Caine, 16 A.D.2d 976, 230 N.Y.S.2d 453 (1962).)

A parent may not be concerned only with the inclusion of his child in a special class; he might also be concerned about the refusal of the district to admit his child to such a class. On this point, the regulations provide: (Reg. 200.3(3) and (4).)

> (3) A Pupil shall not be excluded from special classes in public school programs unless:
>
> (i) It is determined after appropriate evaluation, which may include a reasonable opportunity to be observed in the classroom, that said pupil has insufficient mental development, physical maturation, social maturity or emotional stablish to benefit from the program offered by such classes.
>
> (4) Upon request by the parent or guardian of an exempted pupil reconsideration concerning the admission or non-admission of the child shall be entertained by school authorities at least once a year.

Note, this regulation apparently refers to children who are excluded from both the special classes as well as the regular classes: If the child has insufficient

mental development to benefit from the special classes the presumption of the regulation must be that he also cannot benefit from regular classes. In other words, the child has been "exempted" from the compulsory education laws pursuant to Education Law, Section 3208, and has been given an involuntary medical discharge from any form of formal schooling. At this point, a conflict arises between the Regulation 101.5(2) which is designed to implement Education Law Section 3208 and the above quoted regulation. Regulation 101.5(2) contemplates the possibility a student can be excluded for severe mental retardation for up to two years without being re-examined and then after that point, the exclusion can be made permanent with the approval of the Commissioner. The above quoted regulation contemplates re-examination at least once a year. In any event, temporary exclusion from school can be appealed to the Commissioner. (Matter of Lee A. Reed, 1 Educ. Dep. Rep. 488 (1960).)

The authority of school districts to assign delinquent pupils to special day schools or classes is somewhat different from the authority over the handicapped. A school delinquent is a student who is habitually truant, irregular in attendance, insubordinate or disorderly. (Section 3214(1).) Subsection 5 of the statute also provides:

> After reasonable notice to a school delinquent and to the person in parental relation to him and an opportunity for them to be heard, a public school official, as hereinafter provided, may, with the consent in writing of the person in parental relation to the school delinquent, order him to attend a special day school, or to attend upon instruction under confinement at a parental school or elsewhere, as hereinbefore provided, for a period not exceeding two years but in no case after the minor reaches the maximum age of required attendance upon instruction.

If a parent does not give consent the school may proceed against the parent in court for violating the duty upon parents to "cause such minor to attend upon instruction." (Section 3214(5)(c)(1); and 3212(2)(b).) If the court finds that the parent has not violated Section 3212, "a proceeding shall be brought against the minor for the violation of part one of this article." The reference to "part one" is a general reference to all the sections of part

one dealing with the duty of minors to attend some school. For both parent and child a violation of these provisions is punishable for the first offense by a fine not exceeding ten dollars or ten days imprisonment; a second offense is punishable by a fine not exceeding fifty dollars or by imprisonment not exceeding thirty days or by both a fine and imprisonment. (Section 3233.) Any attempt by a district to short-cut these procedures can result in the district's rulings being overruled. (Watkins v. State of New York, 60 Misc. 2d 653, 303 N.Y.S.2d 760 (1969).)

Other procedures are applicable for the suspension of students from school for five days and yet other procedures for suspensions for more than five days. (Education Law, Section 3214(b).) The Commissioner has said that a student placed in a special class or school may not be deemed to have been suspended from school if the education offered in the special class or school is substantially equivalent to that in regular classes. (Matter of House, 11 Educ. Dept. Rep. 215 (1972).) At the same time, Section 4404(6) provides that boards of education shall establish special classes for delinquent children as may be necessary to provide "instruction adapted to the capabilities of such children under rules to be established by the commissioner of education." The Commissioner has not promulgated any regulations, and it would seem that Section 4404 permits the district to provide a quality of education substantially different from that available in the regular schools by permitting boards of education to estimate the "capabilities" of delinquent children differently from the non-delinquent.

Moving beyond handicapped and delinquent children, there is also statutory language granting districts the authority to establish classification schemes applicable to all other students. Education Law, Section 1709(3) provides that the union free school districts are empowered to prescribe the course of study "by which the pupils of the school shall be graded and

and classified." Boards of central school districts are given the same powers as union free school districts. (Education Law, Section 1804(1).) City school districts are given the power to "regulate the admission of pupils and their transfer from one class, or grade to another as their scholarship shall warrant..." (Education Law, Section 2503(4)(d).) The large city school districts are given power to establish "schools for physically or mentally handicapped or delinquent children or such other schools or classes as such board shall deem necessary to meet the needs and demands of the city." (Education Law, Section 2554(9).) Thus there appears to be ample authority for school districts to establish ability groups and tracking systems.

This last conclusion obtains indirect support from several cases. One court in dicta wrote "After a child is admitted to a public school, the board of education has power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability." (Isquith v. Levitt, 285 A.D. 833, 137 N.Y.S.2d 497 (1955).) In Ackerman v. Rubin sixth grade student eligible to enter Junior High school was denied placement in a special progress class which compressed three years work into two years and was instead placed in a three year special-progress class employing an enriched curriculum. The school board's reason for the placement of the student was that he was too young for placement in the accelerated program and that the extra year of study would serve to help him develop emotionally and socially; the district admitted his academic qualifications would otherwise have made him eligible for the accelerated program. The court upheld the school district saying that the school district in adopting these regulations "acted in the best interests of his son and all other school children." (35 Misc. 2d 707, 231 N.Y.S.2d 112, 114 (1962).) And in Matter of Woodward, 10 Educ. Dept. Rep. 188 (1971)), parents appealed to the Commissioner the decision of the local district to deny their children entrance to a special public school of dance

and music. The Commissioner found that the students had been evaluated by professional dance and music teachers and the refusal to admit the pupils was not the result of prejudice or arbitrariness.

These cases raised directly the authority of the district to assign particular pupils to particular kinds of schools or classes yet both opinions rested on the assumption that such classifications were proper and within the scope of school district authority. These cases taken together with the law of the handicapped, however, do in the aggregate support a conclusion that school districts have ample authority to establish and enforce with considerable unsupervised discretion pupil classification schemes. Indeed, it was necessary for the legislature to pass a specific piece of legislation in order to assure parents and students who felt that a school's health and hygiene course conflicted with their religious beliefs that the students could be exempted from the course.

> Subject to rules and regulations of the board of regents, a pupil may, consistent with the requirements of public education and public health, be excused from such study of health and hygience as conflict with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporation law.

Absent this legislation it was possible under New York law for school to compel students of the Christian Science Church into courses in which health practices were taught which conflicted with the teachings of the religion.

Today the only other state law which regulates the power of the districts to assign students to classes and programs is the recently passed anti-sex discrimination law (Education Law, Section 3201-a.)

> Notwithstanding any general, special, local law or rule or regulation of the education department to the contrary, no person shall be refused admission into or be excluded from any course of instruction offered in the state public and high school systems by reason of that person's sex. No person shall be disqualified from state public and high school athletic teams, by reason of that person's sex, except pursuant to regulations promulgated by the state commissioner of education.

The Commissioner's regulations provide:

Male and female pupils may participate on the same teams in interschool athletic competition under the following conditions:

(i) There shall be no mixed competition in the following sports: baseball, basketball, field hockey, football, ice hockey, lacrosse, soccer, softball, speedball, team handball, and wrestling.

(ii) In schools that provide separate competition for male and female pupils in interschool athletic competition in a specific sport, the principal or the chief executive officer of the school may, in exceptional cases, permit a female pupil to participate on a male team in sports other than those set forth in subparagraph (i) above.

(iii) In schools that do not provide separate competition for male and female pupils in interschool athletic competition in a specific sport, no pupil shall be excluded from such competition, except in the sports set forth in subparagraph (i) above, solely by reason of his or her sex.

In discussing the involuntary assignment of pupils to classes and the refusal of schools to assign pupils to courses, mention has been made of the possibility of seeking an appeal before the Commissioner and the courts. The section now turns to a discussion of court review of these school decisions. The most likely challenge to a decision assigning a pupil to a course or program is one claiming the action was arbitrary and capricious. But challenges on these grounds have not met with much success. (Realy v. Caine, 16 A.D.2d 976, 230 N.Y.S.2d 453 (1962).) More success might be achieved if the petitioner could bring the case under paragraph (4) of Section 7803; under that provision the district's decision must be based upon "substantial evidence." To bring the case within paragraph (4) however, petitioners first must obtain a court ruling that these classification decisions must only be made after a hearing and a decision based on a record. Thus the long term strategy must be one of getting the courts to require school districts prior to classifying a student to hold a hearing if requested by the student and/or his parents. Whether New York courts would rule in favor of imposing a hearing requirement is not clear from the precedent. On the one hand, the courts have refused to write into the law dealing with the dismissal of probationary teachers any right on the part of

the teacher to have a hearing prior to dismissal. (Pinto v. Wynstra, 22 A.D.2d 914, 255 N.Y.S.2d 536 (1964); but see Boards of Regents v. Roth, 408 U.S. 564 (1972) in which the possibility was held out that probationary teachers must be afforded procedural due process when the district fails to renew their contract under circumstances in which state law and policy seemed to give the teacher an expectancy of re-employment for the next year.)

On the other hand, the Court of Appeals has required that a person merely alleged to be a drug addict and who is not shown to pose an immediate threat to society or himself, may not be temporarily detained pending a medical examination under the Narcotic Control Act of 1966, which provides for the compulsory treatment of addicts, without notice and an opportunity to be heard. (Matter of James, 22 N.Y.2d 545, 293 N.Y.S.2d 531 (1968).) Similarly in other cases involving mental patients, the Court of Appeals has been willing to read procedural safeguards into the state statutes to save the laws from being struck down. (In Re Buttonow, 23 N.Y.2d 385, 297 N.Y.S.2d 97, 244 N.E.2d 677 (1968).) But in all these cases the courts said that the precise procedural steps that must be taken are not invariably fixed with regard to all cases and must be tailored to fit the conflicting policy considerations involved in the situation. Thus, whether in the opinion of New York courts student classifications in schools which do not entail long term permanent involuntary incarceration but do entail the imposition of a stigma and the isolation of pupils from other pupils differently classified raise a sufficient threat to student rights to outbalance the interest of schools in avoiding cumbersome procedures is not clear. Hence we cannot be sure what procedural steps might be imposed by the New York courts on schools when it comes to classification decisions. Failing success in the New York courts, students may want to try to achieve a favorable ruling in the federal courts. (See David Kirp, "Schools as Sorters:

The Constitutional and Policy Implications of Student Classification," 121 U. Pa. L. Rev., 705 (1973); and David Kirp, William Buss, and Peter Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 Cal. L. Rev., 40 (1974).)

Finally, yet another approach may be successful in restraining school district authority to assign pupils to particular programs and classes. A parent might argue that a school policy of assigning pupils without parental involvement in the decision is an abuse of discretion insofar as the policy unnecessarily impinges upon another value the legislature of the state has deemed worthy of protection: the rights of parents to control the education of their children. To support such an argument the petitioner would have to show both the nature and degree of the impact of the school's policy and the fact that the legislature has made it state policy to advance parental control of a child's education.

(5) Neutrality and Political Indoctrination. Neutrality and indoctrination are terms not easily defined. For these purposes, neutrality simply means not taking sides on an issue. The term is used in connection with the question of whether schools officially in instructing pupils may take sides on issues of political philosophy and public policy. Used in this way, the issue of neutrality is connected with indoctrination. No one definition of the term indoctrination will be used here, but there is a family of definitions which have been suggested by philosophers to which reference is made:

a. Indoctrination occurs when a person teaches with the intention that the pupil believes regardless of the evidence.

b. The object of indoctrination is to impart unshakable beliefs; the beliefs must constitute doctrines and the doctrines must either be false or not known to be true.

c. Indoctrination occurs when peoples' minds are closed to what is uncertain. Uncertainties are taught as certain and the person who has been indoctrinated thinks he holds a rational belief.

(Taken from I.A. Snook, "The Concept of Indoctrination," VIII Studies in Philosophy of Education 52 (1973).)

More generally it is said indoctrination involves methods that are non-rational: the giving of reasons and appealing to reasons is not involved.

The relationship between the terms neutrality and indoctrination should now be clearer. If school districts are permitted to take sides on issues, then the door to indoctrination has been opened regardless of whether one uses a definition that emphasizes the means, ends or the nature of the content to be imparted. (A review of the definitions presented above will reveal that these definitions place the emphasis in different ways upon the three elements of means, ends, and content to be imparted.) It should be noted, however, that taking sides on an issue does not necessarily mean the schools will attempt to indoctrinate their pupils. The two terms are not synonymous.

With this brief introduction to the terms we turn to a discussion of the authority of local districts to depart from a posture of strict neutrality. New York school districts receive conflicting directions from the state on being neutral. On occasion districts are told that the correct educational philosophy requires "that whatever the subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject." (Matter of Charles James, 10 Educ. Dept. Rep. 58, 63 (1970).) Despite such statements, however, the predominant message that school districts receive from the legislature and department of education is that they are not to be neutral. The statutes require that courses in patriotism and citizenship are to be offered and are to be taken as well as courses of instruction in "the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto." At the same time, another provision provides: "The courses of

study beyond the first year of full time public day schools may provide a program for a course in communism and its methods and its destructive effects." (Education Law, Section 3204(3)(a)(3).)

And when one examines the course syllabuses issued by the department of education, the same taking of sides is evident.

The guide for Social Studies in the 4-6 grade states in the introduction:

> This program also places paramount importance on the building of attitudes which support the American way of life. Throughout the 13 years of school, the basic aims and ideals of American society are highlighted to build an emotional as well as intellectual commitment to the principals [sic] for which we stand as a Nation. The program seeks to develop a deep and abiding patriotism based on knowledge and appreciation of our heritage, the freedoms that we enjoy, and the sacrifices made by many peoples over the years to gain and to defend these freedoms. (The University of New York, State Education Department, Bureau of Elementary Curriculum Development, Social Studies 4-6, 1969, p.v.

The curriculum guides in social studies and American History for high school years are less overtly chauvinistic. The introduction to the eighth grade syllabus on American history quotes the first sentence of the second paragraph of the Declaration of independence and then adds:

> This is an appropriate time for pupils to learn, or recall, these words and then to follow the story of how Americans have striven, often in the face of temporary failure and delay, to make the words a reality. From the story he should develop an appreciation of the progress that has been made, a knowledge, acquired without undue cynicism, of the unfinished tasks that lie ahead, and a sense of his own responsibility to carry out these tasks. p. 66 (Social Studies, Tentative Syllabus, Grade 7: Our Cultural Heritage, Grade 8: United States History, 1965)

The up-beat posture of this syllabus is nicely illustrated in the syllabus on American History for the 11th grade in which the social function of public education as an institution to equalize opportunity is taken up. The questions

and the points raised point to the ideal function the schools are to serve with no discussion of the extent to which the ideal has not been carried out. On some potentially controversial topics, however, the syllabuses note that the topic is controversial and then provide the teacher with quotations and other materials dealing with both sides of the issue. (Section on Pacifism in American Society in American Civilization in Historic Perspective, Part I, A Guide for Teaching Social Studies - Grade 11, The University of the State of New York, The State Education Department, Bureau of Secondary Curriculum Development, Albany, 1970, p. 47.) On yet other issues while providing materials reflecting both sides of the question, a syllabus through the questions suggested for use in the class may bias the discussion in one direction. For example, in dealing with Senator Joseph McCarthy the syllabus suggests the following kinds of questions:

> To what extent did Senator McCarthy use his Congressional immunity to make accusations and employ techniques which would be ordinarily unacceptable and unavailable to the average citizen?
>
> In what ways did McCarthy abuse the very American principles he claimed to be protecting by his investigations?
>
> To what extent were McCarthy's investigating techniques a fundamental assault on an individual's civil rights?
>
> Is there any evidence that motives other than a desire to expose Communists might have been behind McCarthy's exposés?

The list of questions continues with others of a similar nature. (Ibid., p. 108.)

Thus the curriculum guides decidedly are not neutral in the elementary grades while in the high school years they can either be unrealistically idealistic or one sided and critical. If there is a consistent and principled policy with regard to the proper role of the public schools in dealing with these matters, it is not evident in the official syllabuses.

The question of the neutrality or non-neutrality of the course materials used by a local school district has not been litigated in New York, but during

the height of public unrest over the war in Vietnam, the issue of school district neutrality was raised in the courts when school districts attempted to accommodate themselves to various kinds of political activities directed against the government's war policy. The state courts and the Commissioner made clear that school districts are not required to give positive support to a teacher's protest activities by granting that teacher a day of personal leave with pay in order to participate in Vietnam Moratorium Day, October 15, 1969, despite the teacher's claim of a First Amendment Right to be excused. (In Matter of Turmel, 9 Educ. Dept. Rep. 192 (1970).) What we do not learn from the case is whether the local district was legally free to grant the day's leave with pay if it so chose, or whether the district was legally required or legally permitted to grant the leave without pay.

In Lapolla v. Dullaghan, 63 Misc. 2d 157, 313 N.YS.2d 435 (1970), the court was asked to resolve a dispute as to the authority of a public high school to lower its flag to half mast at the request of students in order to express sorrow and sympathy at the death of four students at Kent State University at the hands of the National Guard and to memorialize the 40,000 Americans who had lost their lives in Vietnam. The court ruled the district was bound by its own regulations which required the flag to be flown at full staff on all days with certain exceptions none of which covered this situation. Continuing, the court noted that to lower the flag in sympathy of the Kent State students (no mention was made of the 40,000 dead soldiers) would amount to the expression of a "political concept."

> The flag should not be a vehicle for the expression of political, social or economic philosophy. Nothing in past custom and usage, or existing statute and regulations authorizes the school district or the President of the Board of Education either on its own motion or at the request of students or faculty to lower the flag to half staff to reflect approval or disapproval of the popular cause of the day, no matter how valid the cause or who is involved in promulgating it. If the flag were to be lowered to half mast every time an interest group brought pressure to bear on a Board, the children in the schools and the community at large would be witness to our flag being raised and lowered on an ad hoc basis, perhaps several times a year.

In Nistad v. Board of Education of the City of New York, 61 Misc. 2d 60, 304 NYS2d 971 (1969), the school board announced that teachers and pupils who wished to participate in programs on a day political groups had declared as Vietnam War Moratorium Day they would be permitted to do so without penalty. Students would be excused from school and participating teachers were to charge the day against the number of days allowed them to be excused from school for personal business. A student and his mother sought in court to have the school to hold classes as usual on the day, October 15, 1969, and the court agreed to issue the order. The court's decision was based on two central points. First, it held that the case came within the strictures of West Virginia Board of Education v. Barnett, 319 U.S. 624 (1943), in that the school policy in effect forced students and teachers to declare themselves either in favor or opposed to the government's policy on Vietnam. Those who remained in school would be interpreted to be in support of the policy and those who did not attend would be interpreted as opposed to the policy. Forcing people in this way to "speak" out on an issue was beyond the power of the board. Secondly, the court said the board's power may not be used to support, influence or condone controversial matters or moral issues. In support of this proposition, the court cited Engel v. Vitale, 370 U.S. 421 (1962), a case in which students were compelled in New York schools to recite a prayer composed by the Board of Regents. Thus the court's second point appears to be a different way of stating the first point, namely, that the schools may not coerce students and teachers into expressing a belief on a controversial issue of public policy. But the court also seems to have suggested that the problem was one of--without using the phrase--political entanglement. (Cf. Lemon v. Kurtzman, 403 U.S. 602 (1971).) To permit the district to excuse pupils to participate in political rallies is to allow the board (a) to pick and choose the issues on which students will be excused and (b) to lead to the possibility that next year under a different

board, students would be excused to participate in activities in support of the war policies. Thus, the school district might become the focus of conflicting political demands on the part of students to be released from school.

There are several problems with the decision. First, the school's policy no more compelled a student to speak his beliefs than do the released time programs authorized by the state and held to be not unconstitutional by the Supreme Court / (Zorach v. Clauson, 343 U.S. 306 (1952).) or the decision in West Virginia v. Barnett, supra. Indeed, no actual speech was required of any student. At best, the speech involved was symbolic In any event, a student who remained in school but who disagreed with the government's Vietnam policy could easily have both remained in school and expressed his viewpoint (or avoided a misinterpretation of his viewpoint) by wearing a black armband, a form of protest permitted by the Supreme Court in the Tinker case decided in February 1969, about one half year prior to the decision in this case. (Tinker v. Des Moines School District, 393 U.S. 503 (1969).) (Teachers may have been in a different position. Discussed below.)

Secondly, the entanglement problem is no more severe than with regard to the released time programs. It is true that in a subsequent year another board might excuse students to participate in political activities on the other side of the same issue, but the same problem arises with regard to released time programs: a student may seek to be released from public school for non-religious but philosophical observances and education. The possibilities of such future entanglements did not stay courts from approving released time.

Third, if the court is taken at its word that school authority may not be used to support, influence, or condone on matters of this nature, it is hard to see how the school could raise within its courses any opportunity even to discuss or think about controversial public issues. Indeed, releasing the students from school for these purposes may be less of an entanglement than attempting to include discussion of these pressing problems in the schools.

But perhaps this court would bar such discussions within the classroom also.

Finally, the specter the court raises of continued pressure on the board of education to release students for participation in this or that political activity seems unrealistic. The Vietnam War was one of those special issues which did inflame the general public and frequent recurrence of an equivalent situation is not likely.

In both the New York cases considered above the courts seem concerned with the schools' taking a stand--purposefully taking a stand--in support of a position on the Vietnam War contrary to the then existing policy of the national government. Thus, implicit in the courts' opinions was the following proposition: Nothing that the public school says or does shall have as its purpose, or an avoidable feature or effect of its manner of achieving its purpose, the manifesting of approval or disapproval of any citizen's political or policy viewpoint. (Adapted from a principle state in Nicholas, Wolterstoff, "Neutrality and Impartiality," in Theodore R. Sizer, ed., Religion and Public Education (Boston: Houghton Mifflin Company, 1967), p. 3, 16.) As suggested in the previous paragraphs, however, it can be argued that the schools in question did not violate this principle in either lowering the flag or in releasing the students. But assuming that this is the principle accepted by the courts, schools do intentionally violate that principle when they attempt to build "attitudes which support the American way of life." And it seems unlikely that any student and his parent arguing something like a "no establishment of a particular political viewpoint" would have much success challenging this kind of pro-American curriculum. In response to such a suit the courts are likely to respond that the purpose of such programs is one of the legitimate functions of the public schools in New York, and, to persue this purpose is not an abuse of discretion. In other words, in the context of this kind of suit the courts would be tempted

to disavow the principle stated above which they apparently embraced when they perceived the school's posture to be antithical to the policies of the government.

But perhaps the seeming inconsistency into which we might expect the courts to be pushed can be resolved by the making of a somewhat arbitrary distinction. We might say the above principle has no application to subject matter which deals with fundamental issues of political philosophy, e.g., democracy versus totalitarianism; and socialism versus free enterprise, treated with a broad brush. But the principle does apply to sub-issues which may spin-off from these major topics--issues with which the government does deal day-to-day and year-to-year, e.g., socialized medicine, welfare reform, foreign policy. Hence we might anticipate that petitioners who sought to stop a school program which supported the government's policy in Vietnam might have a chance of success just as did those petitioners in the previous cases who attacked school programs which allegedly were against the government's policy. On these more specific topics a school district might abuse its discretion by intentionally taking a stand.

There is one further difficulty with this line of analysis. As noted in a previous section, the courts generally rely upon the language in Article 78 establishing as the standard of review the standard of arbitrariness and capriciousness. Analyzing school district action in those terms leads the courts into an assessment of the action's rationality--a mode of analysis we have seen above is not entirely suitable to assessing school curriculum policy. (See Section V.A.1 above.) If courts were to concentrate their review upon the narrow question of whether the means selected were related to the school's purposes, the possibility of a non-neutral curriculum

surviving court review would be enhanced. Professor Frank I. Michelman suggested a different line of attack. He suggests that the attack ought to be leveled at the legislature's act of delegating authority to local districts to incorporate some deliberate, systematic, political bias into the school curriculum. Whether such a bias should be part of the school program, it might be argued, is such a fundamental policy choice that it is "legislative" in nature and may not be delegated by the legislature.

The question of an individual teacher intentionally taking a stand on a specific issue currently being debated in the country raises other problems. The Tinker case only had dealt with students expressing their viewpoint on the Vietnam War; as of the time of the two previous New York cases, the issue of an individual teacher taking such a position had not been decided either by the Supreme Court or other courts having jurisdiction in New York.

One teacher on November 14, 1969, and on December 12, 1969, did test the legal waters by wearing a black armband in class even after being warned not to do so; he was dismissed from the school. Charles James appealed to the Commissioner who upheld the dismissal. The Commissioner said the teacher's actions were contrary to "sound educational policies," violated the policy of the department of education which required school officials to be neutral in dealing with "Moratorium Days" and provided this statement of sound policy: (Matter of Charles James, 10 Educ. Dept. Rep. 58, 63 (1970).)

> It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject. If the subject matter involves conflicting opinion, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion that the student may have complete access to all facets and phases of the subject. Petitioner in this case, in wearing the black armband in his classroom, was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists.

(It might be noted that the New York Court of Appeals has held it to be improper for a teacher to wear religious garb in the classroom and in that connection wrote:

> So, also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils, as, for example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July.

See O'Connor v. Hendrick, 184 N.Y. 421, 429, 77 N.E. 612 (1906).)

Charles James after losing before the Commissioner, took his case to federal court. The opinion in Second Circuit Court of Appeals case was written by Judge Kaufman who subsequently also wrote the opinion in Russo v. Central School District No. 1, 469 F.2d 623 (2 Cir. 1972) cert. denied 41 U.S. L.W. 3554 (1973).) In the Russo case a teacher was dismissed because she disobeyed her board's regulation which required that she participate with her homeroom class in the daily pledge to the flag; instead she merely stood silently in the classroom while the other homeroom teacher did participate in the salute. The Second Circuit handled the Russo case and the James case, James v. Board of Education, 461 F.2d 566 (2 Cir.) cert. denied, 409 U.S. 1042 (1972) in a similar manner. Both cases, the court noted, involved activities that had been given constitutional protection when engaged in by pupils: armbands were protected in Tinker, supra, and a refusal to salute the flag protected in West Virginia Board of Education v. Barnett, supra. Also in Russo and James, the Second Circuit disposed of any question that the district could control the claimed freedom of speech on the ground of the disruptive impact of the speech since Judge Kaufman found there was no disruption as a result of what the teachers did. (James, p. 572, Russo, p. 633.) Thus the central issue in both cases became whether the school could control the teachers as part of its general right to control the school curriculum. (James, p. 573, Russo, p.532) Could the school because of this basic authority impose greater limits on the speech of teachers--which arguably has a greater impact upon the curriculum than similar exercises of speech by pupils--then the schools may impose on students? (James p. 571, Russo, p. 631.) As for the school's authority to control the courts said:

> ...[A] principle function of all elementary and secondary education is indoctrinative--whether it be to teach the ABC's of multiplication tables to transmit the basic values of the community. (James, p. 573.)
>
> It is a proper, and appropriate function of our educational system to instill in young minds a healthy respect for the symbols of our national government. School officials, therefore, may enforce regulations whose purpose is to give effect to this legitimate state aim. (Russo, p. 632.)

But in neither case could the inquiry rest at this point. In both cases the court said the next question was whether the regulation enforcing the school curriculum policies was drawn narrowly as possible to achieve the social interests which justify it without unduly restricting protected speech greater than is necessary to protect those interests. (James, p. 574, Russo, p. 532.)

In both cases the Second Circuit concluded that the schools had gone too far. While school districts do have authority to prevent teachers from undertaking an effort in "unrelenting indoctrination" and thereby to protect pupils from "such dogmatism," in neither case did the court find that the teachers had attempted to proselytize the students. (James, p. 573-4; Russo, p. 633.) Judge Kaufman also found that neither teacher's activities interfered with the schools own program. The armband in the James case did not distract from his teaching of poetry and in Russo, the class continued to recite the pledge under the direction of another teacher. (James, p. 574-5; Russo, p. 633.) Finally, in both cases the court took notice of the fact that the students were of high school age, 11th and 10th grade in James and Russo respectively, and to keep these students isolated from conflict was neither good educational policy nor, in any event possible. "It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue. Under the circumstances present here, there was greater danger that the school, by power of

example, would appear to the students to be sanctioning the very 'pall of orthodoxy,' condemned in Keyishan, which chokes freedom of dissent. (James, p. 574.)

To this point the discussion has dealt with neutrality and issues related to that question, but the opinions of Judge Kaufman provide a handy way to lead into the question of indoctrination by the schools. The dicta in the opinions indicates that in the view of the Second Circuit Court of Appeals school boards properly may merely not be non-neutral but also may indoctrine pupils. As part of their authority to engage in a policy of indoctrination, school districts may regulate any attempts on the part of individual teachers to themselves indoctrinate the pupils with regard to doctrines the school board disagrees with. If there is to be indoctrination in the schools, the boards of education may be in sole charge of the effort. What Judge Kaufman did not say, because it was not directly relevant to the problem with which he was faced, was that the school board itself is subject to the control of the state legislature and Commissioner, a point that should now be so obvious that it need not have been repeated except for the fact that it lays the basis for the following comments.

Do local school districts in New York have the authority to indoctrinate their students? The answer is most certainly 'yes' with regard to the use of such methods of indoctrination as a pledge to the flag. Section 802(1) provides:

> It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.

Pursuant to such authorization, schools required students to take part in a daily pledge to the flag in People ex. rel. Fish v. Sandstrom, 279 N.Y.

523, (1939) over religious objections. This case, of course, is no longer good law in light of the later Supreme Court decision in West Virginia State Board of Education v. Barnett, 319 U.S. 624 (1943).

Since the Supreme Court's decision in Barnett, the state's policy on flag salutes has changed somewhat. After simply taking note of eastern New York federal district court decision in which a preliminary injunction was granted barring a school district from excluding from a classroom a student who refused to stand during the pledge to the flag, a circular from the department of education stated that it continued to be New York policy that all public schools in the state hold a daily pledge ceremony. (Circular from Herbert J. Johnson, Deputy Commissioner for Elementary and Secondary Education, University of the State of New York, to School District Administrators, January 30, 1970.) Later that year on June 22, 1970, the Commissioner issued an opinion in an appeal by a student who sought to have the Commissioner order the district to allow her to remain seated in the classroom during the pledge. The Commissioner upheld the school's policy of giving the student a choice of standing silently or leaving the room. In reaching this conclusion, the Commissioner said the problem in the case was one of harmonizing the rights of the petitioner not to participate in the flag with the rights of the other students not to be disturbed as they participated. Here he found the school's policy properly harmonized those rights whereas "Petitioner in this case has shown a callous disregard for the interests of her classmates who wish to participate in a meaningful ceremony (In Matter of Bielenberg, 9 Educ. Dept. Rep. 196 (1970).) And in an undated pamphlet, Guidelines for Students Rights and Responsibilities, issued by the State Education Department it is said that a student "who chooses not to participate may either stand and remain respectfully silent or leave the classroom during the rendering of the salute or pledge." [Citing Matter of

Beilenberg, supra. and Richards v. Board of Education, Union Free SChool District, No. 17 U.S.D.C., E.D.N.Y., July 10, 1970.] The pamphlet inexplicitly omitted citing Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969) which granted a preliminary injunction barring enforcement of the same rule. And in a later case the Commissioner once again implicitly upheld the rule in striking down another school regulation which provided that: "...students who hold a sincere conviction giving rise to a conscientious objection to the Pledge of Allegiance shall establish this fact with a written statement indicating the reason and rationale for such convictions. These written statements shall be signed by the student and his parent or those in parental relationship to him and shall be submitted to the principal of the school. The Commissioner wrote that: "petitioners are of sufficient age to make their own judgments in matters of conscience. While parents have a right to be informed by school authorities when their children make such a serious decision as the one involved here, parental consent cannot be made prerequisite to the student's right to make such a decision on pain of suspension." (Matter of Bustin, 10 Educ. Dept. Rep. 168, 169 (1971).)

Subsequent to the Commissioner's establishment of a consistent policy upholding rules not permitting a student to remain seated during the pledge, the Second Circuit struck down such a rule in Goetz v. Ansell, 477 F.2d 636 (2 Cir. 1973) as a violation of the student's First Amendment rights. The Court noted that the act of standing was itself part of the pledge. New York State Regulation, the court pointed out, requires that someone pledging the flag to stand and the court quoted a three judge district court which said that standing "is no less a gesture of acceptance and respect than is the salute or utterance of the words of allegiance." Continuing, the Second Circuit said to exclude from the classroom one who refuses either to stand and pledge or to simply stand, reasonably may be viewed as having the effect of punishing non-participation. Neither may the school in this case bar the

student from remaining seated in the class on the ground of the disruptive effect of the action. There was no evidence of disruption and, in fact, a poll taken by the student of his classmates indicated they were not disturbed. In dictum, the court added that if there were disruption shown it would not hesitate to hold the student was not to be protected.

In addition to the daily pledge, state policy requires that schools observe Flag Day, June 14 (Commissioner's Regulations, 108.6) and required that students be indoctrinated to accept the following: (Reg. 108.7)

> Instruction concerning the flag as a symbol of American life should not be limited to the observance of Flag Day. Before leaving the elementary school each child should come to think of himself as a 'maker of the flag' and each pupil who passes through the secondary school should be guided in sober thought as to the meaning of 'liberty and justice for all.'

Beyond these regulations do school districts have authority to engage in indoctrination? The issue has not been tested in courts but it would seem in light of the discussion above on authority to control methods of instruction that districts may use indoctrination. Materials for instruction could be selected that totally exclude any kind of rational discussion. Rote memorization of non-neutral doctrines about the American past and present could be required. Tests could be constructed that called for repetition of the officially accepted dogma rather than for analysis of issues and problems. Requirements could be imposed for participation in various kinds of patriotic ceremonies in connection with the anniversary of the birth of major figures in American history. Patriotic displays could be prominantly set up in the school buildings. Outside speakers on patriotic themes could be invited to the schools. The possibilities for a genuine effort at indoctrination are clearly available to the local districts. The only indications we have that such practices might be stopped comes from such statements as the quote from the Commissioner set out above from the James case.

Perhaps only if indoctrination methods become so heavy handed that they override other valued interests also protected and fostered by the state might a successful attack be brought in the courts. For example, if it could be shown that the indoctrination had gone so far as to be tantamount to brainwashing then it might be argued that the schools are no longer "educating" a function imposed upon them by the state constitution. Such an argument is not easily mounted, however, as neither the term brainwashing nor educating have a precise meaning so that a court could determine when one activity began and the other left off.

(6) Acculturation. It is common for schools to attempt to acculturate their students with regard to: the proper sex roles in family and society, the proper attitude toward time, competition, cooperation, fate, achievement, work, authority, punctuality and even nudity (an issue which arises in athletic programs). Additionally schools attempt to inculcate notions of good taste in dress, hair style; to instill proper habits in eating, health care and to promote the correct view with regard to dating, marriage and sex. These efforts at acculturation can take the form of coercive school rules as, for example, school dress codes. No comments will be made here on these rules since much of that ground has been covered by Stephen R. Goldstein in "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 U. Pa. L. Rev. 373 (1969). But

In this article Professor Goldstein draws a distinction between coercive rules and courses:

> There are other considerations involved, however, in cases where a school board adopts coercive rules of conduct in order to instill societal values in its pupils. Certainly, instilling such values is an accepted part of the educational function, and may include not only the presentation of information, but also a certain degree of indoctrination. (fn. omitted) Yet, there is still a difference, for example, between conducting a course in "Marriage and Family Living," in which the dangers of teenage marriage are discussed and even inveighed against, and excluding married students from school or from extracurricular activities as a means of inducing the other pupils to believe that teenage marriage is undesirable. The former is the traditional mode of education through instruction, or indoctrination by persuasion; the latter is an attempt to instruct or indoctrinate students by imposing sanctions on pupils who violate those rules embodying the values sought to be imparted--values often, in an area of delicately balanced legislative judgments. Moreover, the parents who disagree with the indoctrination can counter-indoctrinate at home; but parents whose children have been coerced into following a course of conduct, or who have been penalized for their actions, cannot counter so readily.
>
> Of course, in deciding whether a "Marriage and Family Living" course should be taught, and what its content should be if it is taught, school authorities cannot escape making delicate value judgments. This may, indeed, be a partial explanation of the prevalence of elected school boards in this country. Yet the value judgments involved in such decisions are of different dimensions than those involved in punishing student action that does not conform to a value system prescribed by a school board. Forced conformity to a social value system is the function of the representative, general legislature. Although we usually elect our school boards, as we do our state legislatures and municipal governments, we do not elect them to perform this general legislative function. Moreover--to return to the example of teenage marriage--the legislature has adopted a statutory scheme that, within limits, leaves the question to private decision making by the students and their parents. The imposition of sanctions by a school board is an invasion of this legislatively sanctioned, private decision-making scheme. (pp. 391-3)

Several points Professor Golstein makes here are worth emphasizing. As for courses designed to acculturate students he argues it has traditionally been the function of local boards of education to make the policy judgment as

to the values to be instilled. By implication, he asserts, these value choices are properly a subject of majority rule thus the prevailing local culture may impose its values upon the minority through the use of these non-coercive courses. Local districts need not and do not follow a rule of cultural neutrality such as might be analogous to the political neutrality principle stated in the previous section. When a district chooses to acculturate students through the use of courses it has chosen a traditional and non-coercive method of acculturation which does not significantly impinge upon the parents' own efforts to acculturate the child. Finally, there is a strong suggestion in the paragraphs that acculturation by the means of courses may be immune from any successful non-constitutional challenge in the courts.

Two points with regard to this analysis need to be made: (a) courses which acculturate may not be as non-coercive as is implied by Professor Goldstein, and (b) further analysis is warranted on the question of whether a successful non-constitutional challenge might be mounted in the courts against these attempts at acculturation. (a) /Courses which attempt to acculturate can use coercive methods when students are required to repeat in class the accepted cultural line on a given subject and when their papers and examinations are graded in terms of the accepted cultural answer. Indeed wrong answers on teacher prepared tests and on standardized tests can result in the student being labled as dumb and that label in turn can itself result in a change in teacher attitudes toward the pupil and even placement of the pupil in lower or slower tracks and ability groups. Further, the acculturation efforts of the school are likely to be pervasive--running through every course and book the student is expected to take and read. The pressures are subtle and not easily avoided. Finally, the pressures imposed upon the student may result in the student being caught between two opposing and coercive forces: school versus family and community.

(b) While Professor Golstein may be correct in his implication that a successful challenge in the courts to such acculturation efforts may not be forthcoming, the reasons for this prediction need to be assessed. The analysis will focus on three kinds of problems: (i) parents seeking to challenge the schools acculturation policy so as to force the school to be neutral; (ii) parents seeking exemptions for their own children from specific courses; (iii) the adoption of ethnic study programs in which students may voluntarily enroll.

(i) In the previous section we saw that New York courts were willing to strike down school board actions that were not neutral with regard to the government's policy on Vietnam. The question here is whether a school which deliberately attempts to acculturate its students would also be deemed to have acted beyond its powers. In approaching this question, the courts as in the previous Vietnam Moritorium day cases would not concentrate upon the impact of non-neutrality upon individual students in the school, but rather would concentrate upon the more abstract question of scope of authority and the power of the district. The question is whether the legislature intended to grant authority to acculturate to local districts? The question is fairly obvious: it is doubtful any court would conclude that local New York districts did not have the power to acculturate their pupils in the dominant "white" culture of the nation. Attempts at such acculturation have been so long a tradition in New York schools that if the legislature thought this was an improper activity there would have been ample time to make legislative disapproval a matter of law. In any event, New York courts historically have interpreted school district enabling acts liberally. (See p. 68.)

It is also clear from the statutes that schools have the authority to provide students of limited English-speaking ability with courses designed

"to impart to students a knowledge of the history and culture associated with their languages." (Education Law, Section 3204(2-a)(b).) While it us usually assumed that, for example, Spanish-speaking students will voluntarily enroll in such courses, it might also be safely assumed that schools would have authority to compel these students to take these courses in their own culture. If challenged that such a requirement was an abuse of discretion or arbitrary and capricious, schools could argue that these courses are necessary to enhance the student's capability to learn to read and write in his native tongue and that learning to read and write in his native tongue is, in turn, an important prerequisite for being able to learn English later in his educational career. Research, the school could suggest, shows that students who have mastered their mother tongue are better able to learn a second language. (Vera P. John and Vivian M. Horner, Early Childhood Bilingual Education,, Modern Language Association of America, 1971, pp. 165-173.)

A more difficult question is whether a district whose board was dominated by, say, Puerto Ricans, would be permitted by New York courts not only to acculturate the Puerto Rican students in Spanish culture but black as well as white students. Or could a white dominated board have the authority to require white students to be acculturated in black or Spanish culture? Logic would suggest that if school boards have the authority to acculturate minority pupils in white culture, they also have the authority to introduce white students to minority culture and each minority to the culture of other minorities.

(ii) But perhaps the approach that would be taken to these problems would not be in terms of the power or authority of the district, but would raise the issue of the right of the parent to obtain an exemption for his child from a particular course or courses. New York courts, however, have not as yet, as in other states, established a common law doctrine that permits parents to

obtain an exemption for their children from courses the parents claim are hostile to their beliefs. (cf. Hardwick v. Board of Trustees, 54 Cal. App. 696, 205 P. 49 (1921).)

In assessing what courts might do with such a request we need to consider the multiplicity of factors a court might weigh and balance in reaching a decision. First, on the side of parent, is the interest of the parent in controlling the education of the child. New York has, to a limited extent, given statutory protection to this parental right. (Education Law, Section 3204(1); Family Court Act 232.) Second, Education Law Section 3201 prohibits a school district from excluding a child from school on account of race, creed, or national origin. Arguably this provision also prohibits programs which effectively exclude a child from school such as when a school imposes upon a child a course of study sufficiently different in cultural values from his home culture (which is closely associated with his nationality) that he becomes confused and uncertain and retreats into a defensive silence and alienation. (cf. Robert V. Dumont, Jr., "Learning English and How to Be Silent: Students in Sioux and Cherokee Classrooms," in Courtney B. Cazden et al. (eds.), Functions of Language in the Classroom. (New York: Teachers College Press, 1972).
Third, at least students of "limited English speaking ability" have an affirmative interest protected by the state in receiving instruction as to their own culture and history. Section 3204(2-a) requires school boards to provide these children with such instruction if bilingual programs are offered. Finally, it might be argued that children have an interest in personal inviolability and integrity. The interest is not to be "invaded" by an educational program so that personal values are undermined, the student's personality restructured. (John Rawls, A Theory of Justice, p. 250.) Arguably constitutional law has taken steps toward the recognition of such a right in West Virginia v. Barnett, supra., if the case is read as giving

protection to the child's personal integrity. Similarly, the constitutional doctrine of "privacy" in its many manifestations is a way of attempting to protect individual values from intrusion by government. (Roe v. Wade, 410 U.S. 113 (1973): Griswold v. Connecticut, 381 U.S. 479 (1965).) And New York in Section 3204(2-a), discussed immediately above, also seems to point toward a legislative concern with buttressing and affirming to an extent the home culture and values of the child--a concern quite in opposition to a desire to change the child's culturally-based values.

Given that these interests arguably are protected by New York law, the court would continue with its analysis/determining by the extent to which the school's program did have a significant impact upon the child seeking the exemption. Here the petitioner would begin to run into trouble. It will not be easy to demonstrate that the school's program deprives the parent of his control over the child's education; that the program effectively excludes the child from school or is so overbearing as to invade the child's personality. Probably only in the most extreme cases of acculturation would a court feel secure in agreeing with the complaining parent.

But while the court's inquiry might stop at this point, it is also worth while to examine the school's interests. Schools traditionally have adopted as an important purpose the acculturation of children. The reasons behind such a policy include a reduction in cultural and social cleavages and thus improvement of the possibilities for making democratic forms of government work. Next, it might be argued that it is the very function of education to intrude upon the individual student, to "violate" him and force him to re-examine his own life, values, standards, and goals. An additional factor which a court could not ignore is the state

policy of vesting considerable authority in local districts to determine which child will be enrolled in which course or program. The extent to which the legislature has given local districts such power helps a court to determine the extent to which the legislature has placed a heavy weight upon the right of the parent to control his child's education. Next a court could not ignore the fact that recognizing a right of parents to seek exemptions from courses, may be a partial step in granting "state authority" to a parent to make discriminatory choices. Thus, parents who could obtain an exemption for the child could boycott classes instructing in white or black or Spanish culture. (Cf. Reitman v. Mulkey, 387 U.S. 369 (1967); San Francisco Unified District v. Johnson, 3 Cal.2d 937, 92 Cal. Reptr. 309, 479 P.2d 669, cert. denied 401 U.S. 1012 (1971).) And in exercizing this "state power" it might also be asserted parents would be violating Section 3201 prohibiting the exclusion of children from the public schools on account of race, creed, color or national origin. In any event, in allowing a reallocation of authority from school to parent (and court), the court would be forced to assess the risks entailed in making the new allocation. Not only would the grant of an exemption permit minority students to avoid courses designed to acculturate him, it might also open the door for white students to seek to avoid programs designed to introduce them to minority cultures. Social cleavage may not only be left unaffected, but might be exacerbated as children openly refuse contact with other cultures.

School districts could also argue in support of forced acculturation, whether it be of minority students into the majority culture or vice versa, that it is necessary for the smooth operation of the school itself. Unless the students in the majority and minority learn about, even adopt and accept some aspects of the culture of groups of whom they are not a part, the internal tensions and conflicts within the schools may so persist that the other educational goals of the school are placed into jeopardy. Indeed a school might argue

that absent some imposed acculturation the tensions and conflict in the school may be such that the school cannot even guarantee the safety of the pupils in the school. The school's "host function," apart from its educational function, requires that the effort be made. And while these are difficult assertions conclusively to establish, it seems unlikely a court would quickly dismiss such claims as unsupported.

Any court reviewing these issues must take into account its own role defined by Article 78. As discussed above, the 'arbitrary and capricious' standard of review discourages a court from intervening in a school district's curriculum policy. A greater scope of review might be afforded under the "abuse of discretion" standard, but this standard has usually been interpreted by the courts as merely a restatement of the arbitrary and capricious standard.

Finally, courts contemplating the wisdom of recognizing a right to obtain exemptions from school courses must ask whether the subject is judicially manageable. Will like cases be treated alike? Will principles or a line of consistent precedent emerge which can guide the interested parties--school districts and parents? Can some of the central factual questions raised by the approach be answered by the courts, e.g., the impact of school's program upon the child, and the risk incurred if exemptions are granted. Are the values to be balanced sufficiently commensurate that the trade-off can and should be left to the legislative process? Can guidance on weighting the values be obtained from the legislature and from consideration of the society's traditions so that the court does not have to rely only upon its own intuition? In a word, can courts contribute anything to the resolution of these disputes and conflicts beyond simply injecting another participant in the struggle with power to affect the outcome?

The answers New York courts are likely to give to the above list of questions is such that they would conclude judicial intervention is not warranted: as previously discussed, New York courts have been restrained in the exercise of their reviewing powers.

(iii) A third issue is whether New York schools may establish courses or sets of courses black students voluntarily take, the central purpose of which is to acculturate these students in black culture and history. Here a distinction is to be drawn between compensatory education programs whose purpose is to provide remedial assistance in reading, writing, and arithmetic. To provide effective programs of that sort, it has not been shown to be necessary also to provide students with black culture and history, hence the two kinds of course offerings are conceptually and practically distinct.

These courses in black studies, besides including a heavy concentration on black culture and history, also may provide a "black perspective" on historical and current events, that is, an analysis of American history and politics that is more critical than that usually found in public schools. Typically, it is also assumed that such courses need to be taught by black teachers. And while students may not be explicitly excluded from such courses, it is possible that over time the course, because of its content and the teacher's race, may gain a reputation as a course for-blacks-only. (cf. The discussion of Black House, an alternative public school, in "Comments: Alternative Schools for Minority Students: The Constitution, The Civil Rights Act and the Berkeley Experiment," 61 Cal. L. Rev. 858 (1973) [Hereafter cited as Comment.].)

While New York school districts have been explicitly empowered to provide bicultural courses for students of "limited English speaking ability," it is doubtful that this section (Education Law, Section 3204(2-a)) was intended to apply to black students, even if they speak a variety of English termed Black English.

There also exists an explicit statutory prohibition against excluding any child from public school on account of race, creed, color or national origin. (Education Law, Section 3201.) Hence, the issue arises whether--in a non-constitutional analysis of the problem--this provision bars the offering of such courses as described above?

One reply might be that since we are talking of a course or set of courses, the statute does not even apply as it prohibits exclusion from "any public school" and a course or program is not the equivalent of a public school. In any event, white students are not absolutely excluded from a school but only arguably excluded from part of a school and thus are not otherwise denied an integregated education. Neither are black students assured a totally segregated education.

Assuming, however, that the statute is not so limited, the next argument might be that no student has been excluded from any course by any state action. Simply as a matter of free choice, only black students have enrolled in the course(s). An argument of this sort may be upheld if there are no other indicia suggesting lack of free choice in the situation, e.g., a history of racial conflict and the separation of the races in that school district and in that building. (In the constitutional context free choice is arguably permitted even if it results in segregated schools in school districts that were once segregated by law if the dual school system has been completely dismantled. See the discussion in Comment, p. 886.)

Finally, a court might be willing to interpret Section 3201 to permit the existence of these courses if this limited segregation can be justified in terms of the educational benefits accruing to the black students. In other words, even assuming the school subtly accepts and does not counteract the "blacks-only" reputation of the course(s), there may be a justification which

would lead a court to let them remain in place despite the use of race as an unspoken criteria for admission. One indication that the courts might be willing to accept such an interpretation of Section 3201 is the fact that in other cases that section has been held not to bar voluntary affirmative steps to achieve improved racial balance in the schools: race may be a basis for assigning pupils to schools when the purpose is integration. (Balaban v. Rubin, 14 N.Y.2d 193, 250 N.Y.S.2d 281, 199 N.E.2d 375 (1964), cert. denied 379 U.S. 881 (1964); Van Blerkom v. Donovan, 15 N.Y.2d 399, 259 N.Y.S.2d 825, 207 N.E.2d 503 (1965); Vetere v. Mitchell, 15 N.Y.2d 259, 258 N.Y.S.2d 77, 206 N.E.2d 174 (1965), cert. denied 382 Y.S. 825 (1965); Steinberg v. Donovan, 45 Misc.2d 432, 257 N.Y.S.2d 306 (1965); Katalinic v. City of Syracuse, 44 Misc.2d 734, 254 N.Y.S.2d 960 (1964).)

If integration is an acceptable purpose for justifying excluding some pupils from schools on account of race, perhaps other purposes might also be acceptable justifications for taking race into account. For example, a school district might attempt to establish that the course does in fact achieve its purpose of acculturating black students in black culture and as a result enhances black self-confidence and pride and ultimately school achievement. Further, the school might also attempt to prove that this purpose could not be achieved if white students were enrolled in the course. In this form, the argument would be an attempt to meet a test analogous to one found in constitutional law: that the course served a compelling purpose and that it was necessary to achieve that purpose that white students not be affirmatively injected into the course. (This test / states the burden the state must meet when the strict scrutiny standard of review is employed by a court in Equal Protection cases arising under the Fourteenth Amendment. See e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).)

This argument coupled with the limited nature of the racial exclusion and its limited duration--one or two courses for part of each day--may be persuasive. A major difficulty with the argument is establishing that it is necessary for the course to be primarily for blacks in order for the course to achieve its objectives and that its objectives are compelling. With regard to either point the school district would not be able to rest on an entirely solid social science base. As a result, the case would be a close one and more likely to be decided against the district given the probable inherent reluctance of courts to place their imprimature on any form of segregation.

* * * * * * * * * *

Before turning to a discussion of the legal position of other participants--actual and potential--at the local district level some preliminary comments are necessary to place the material in perspective. While much of the following material assess the statutorily created authority of these participants, a persistent theme throughout the next pages is the standing of these participants to seek review in the courts and before the Commissioner of local district curriculum policy. As will be shown, in the courts occasionally have been fairly liberal in granting a variety of petitioners standing to seek review; the Commissioner has been somewhat less liberal. But despite the willingness to extend judicial power by developing a liberal doctrine of standing, the courts, it should be recalled, are not as aggressive in exercising review once they have undertaken to decide the case. Thus, in giving recognition to the courts' occasionally liberal standing doctrine it should be remembered that the petitioner is still not assured of success on the merits of curriculum. As discussed in the previous section, the courts are not prone to intervene to overturn a school curriculum decision.

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B. Superintendent and Principals

The smallest school districts in the state lack authority to hire a superintendent of schools; the next largest districts are given permission to hire a superintendent (Sections 1604, 1711); and the small and large city school districts are required to hire a superintendent (Sections 2503(5) and 2554(2)). In all instances when a superintendent may or must be appointed, his duties are specified by statute. Among the specified duties is the duty to prepare the content of each course of study to be submitted to the board for approval and to recommend suitable textbooks. (Education Law, Section 1711, 2508, 2566.) Thus, superintendents are given the initiative to formulate local district curriculum policy, subject to the final approval of the board. This minimum role the superintendent must play appears to reflect a decision on the part of the legislature that local school districts are to be jointly operated by a publicly elected board and a professional administrator.

At the same time the statute makes clear that there is a maximum role which the superintendent may play: he has no authority to give final approval to either the basic curriculum policy of the school nor the selection of textbooks (a term which includes more than just the actual books used in the school). But the range of discretion potentially left to the superintendent is still considerable as he may be given the full responsibility of formulating a proposed policy subject only to formal board approval. Also, since final approval does not rest with the superintendent, the board in delegating authority to the superintendent need not specify standards according to which he must work.

The superintendent's independence from the board is underscored by cases which recognize him as an aggrieved person within the meaning of Section 310. Thus, in People v. Finely, 211 N.Y. 51, 105 N.E. 109 (1914), the superintendent was given standing to appeal to the Commissioner to reverse orders of the board

of education to place 3000 teachers on the list of those eligible to teach. The superintendent claimed these teachers received their licenses years prior to the board's order and were not competent to teach. The Court in granting the superintendent standing to appeal to the Commissioner (and by implication standing to appeal to the court itself over whether he had standing before the Commissioner) said: (p. 58-59)

> ...it seems to us that it would be almost absurd from any practical standpoint to say that the superintendent of public schools in the city of New York is not interested in the decision of the board of education and was not aggrieved by it if it was erroneous. Without attempting to differentiate the powers and duties conferred upon him and upon the board of education, it is sufficient to say that under the statutes and regulations governing that subject, he is entrusted with large powers and charged with very responsible duties in the government and administration of the public schools, and is largely and vitally interested in having them properly administered. Without passing on that question at all, it is perfectly evident that if the board of education, as claimed by him, has improperly placed on the eligible list from which certain teachers are to be drawn three thousand persons who are not entitled to be there, many of whom are incompetent to discharge the duties which would be assigned to them, the administration of the schools will be substantially interfered with and the successful discharge of his duties and the exercise of his powers will be impeded and he is aggrieved and interested in having this decision reviewed.

(Also see People v. Draper, 78 Misc. 329, 138 N.Y.S. 351 (1912).)

A treatise on New York civil procedure flatly states "A public officer can maintain such a proceeding [mandamus in a court to enforce a public right or to compel the performance of a public duty] in his official capacity where he has an interest in such capacity in the subject matter of the proceeding." (Carmody-Waite 2d, Vol. 24, Section 145:260 p. 58, Lawyers Co-operative Publishing Co., Rochester, N.Y. (1968).)

The law on standing and the statutorily defined role of the superintendent all point to a certain independence for the superintendent. In contrast, the principals enjoy no special status in the law: their duties and powers are entirely subject to board control. (See, e.g., Education Law, Section 2503(5).) The courts have made clear, however, that important

discretionary duties may be delegated to principals even without accompanying detailed standards. (Parrish v. Moss, op. cit.) (See Section I.A.(N) above.)

C. The Teacher

Everything said to this point should suggest that the teacher does not necessarily enjoy any authority whatsoever in the formulation of curriculum policy. Whether the teacher is granted such authority--barring for the moment claims of academic freedom--is itself a decision within the discretion of the board of education. Absent such a grant, the extent of control over the teacher is emphasized in Worley v. Allen, 12 A.D. 2d 411, 212 N.Y.S.2d 23 (1961). There James Worley, a tenured and "competent and perhaps inspired, teacher of English" and chairman of the high school English department, was ordered by the assistant principal of the high school, pursuant to school board policy, to file his "lesson plans" in advance for two-week periods. The plans were to include the program and materials for the next two weeks. The district explained the policy was "to insure to the administrators that teachers were in fact continuously preplanning their classroom instructions, to inform the administrators on the general nature of this lesson preplanning, to enable the administrators to assist teachers in their lesson preplanning, and to have lesson outlines available to substitute teachers." Upon refusing to file the lesson plans, Worley was dismissed. The Commissioner upheld the board and Worley appealed to the courts, which in turn upheld the board's rule as a reasonable exercise of the board's authority to control the curriculum. "Even in the case of highly talented teachers, educational authorities would normally be expected to have the power to see they perform their jobs; are in regular and prompt attendance; carry out the authorized syllabus, and teach specified areas of the subject matter. This is a minimal necessary power for any functioning school administration." Continuing, the court observed that "There is some loss of academic freedom in

all organized education...And when the school becomes the common enterprise of more than one teacher, the discipline and direction usual to common enterprises are felt as the need of the school, too."

The lack of legally protected discretion on the part of the teacher is further reinforced by what indications there are as to the status of the doctrine of "academic freedom" in New York. While no New York state or federal court cases were found which dealt directly with claims of academic freedom, the armband and flag salute cases discussed above shed some light on the Second Circuit's view of academic freedom in public secondary schools. Despite the protection granted in those cases it is doubtful the cases lend themselves to much expansion beyond the facts of the cases themselves. In both cases the court stressed that the teacher's exercise of free speech did not interfere with the regular school program which was to be under the complete control of the school board. If there was to be indoctrination in the schools, the school board was the agency to define its purposes, content and methods. Thus the cases represent only a protection of a teacher's right to make a personal statement about one issue and not necessarily protection of a right to control the content of the school curriculum. At best the cases might permit the teacher to make a non-intrusive personal statement about his beliefs as to a topic prescribed by the board of education. Finally, the cases do not address themselves to the issue of whether only political speech is to be protected or whether a similar protection is to be extended to a teacher's espousal of such matters as the theory of evolution. If non-political speech is to be protected, presumably the protection extends no further than the protection to be given political speech; but the protection may not go as far as that given political speech since political speech may enjoy a special position in constitutional doctrine.

Given the extensive control a school board has over what the teacher must teach, it thus also appears unlikely that a teacher could obtain standing

as a teacher (as opposed to standing as a citizen or taxpayer--discussed below) to seek review in the courts of the district's curriculum policy. Unless the curriculum policy of the district directly affected the teacher in such a way that he was "aggrieved," a simple concern with the wisdom of the policy would probably be insufficient to achieve standing. (See for example, Semple v. Miller, 38 A.D.2d 174, 327 N.Y.S.2d 929 (1972) in which the court denied standing to state employees to challenge the closing of a state school in which they worked.) Standing, however, might be recognized if districts policy were to force the teacher to choose between obeying the school board and violating a statute or constitutional provision, e.g., requiring the teacher to give instruction about the Bible that is not purely objective. (Epperson v. Arkansas, 393 U.S. 97 (1968).)

Obtaining standing before the Commissioner appears to be no easier task. Only if the action of which the teacher complains directly affects the teacher is standing likely to be granted. Thus in one case a court decided that teachers who did not claim to represent the Communist Party were not to be deemed aggrieved persons for purposes of complaining about a school policy which proscribed the Communist Party as a subversive organization. (Adler v. Wilson, 203 Misc. 456, 123 N.Y.S.2d 806, aff'd 123 N.Y.S.2d 655 (1953).)

D. Teachers' Union

The Taylor Act (Civil Service Law, Article 14) assures teachers of the right to negotiate collectively their terms and conditions of employment. (Sections 200, 203.) Section 201(4) further provides:

> The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment, provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries, no such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

Since the scope of negotiations is not precisely defined, the question arises whether (1) districts may, if they wish, negotiate with unions over school curriculum policy and (2) whether districts must negotiate, if requested to do so by a teachers' union, the district's curriculum policy. The first question has not been explicitly addressed by the courts or the Public Employment Relations Board (PERB, established by the Taylor Act) but the Court of Appeals has said that a district may negotiate with regard to any subject if not expressly prohibited. (Board of Education of Union Free SChool District No. 3 of the Town of Huntington v. Associated Teachers of Huntington, 30 N.Y.2d 122 (1972).) The second question is more controversial, and roughly speaking the courts and PERB have answered "no."

The following issues have been excluded by PERB as a mandatory topics of negotiations: employment of subject specialists so as to assure students a minimum amount of instruction in art, music, science and physical education; involvement of teachers in curriculum development; the role of guidance counselors; and the decision by the district to furnish speech therapy services through a contract with an outside center for speech disorders. (See Hearing Officers' Decisions in Yorktown Faculty v. Yorktown Central School District, 7 PERB 4509 (1974), and Union Free School District No. 14, Town of Hempstead v. Hewlett-Woodmere Faculty Association, 6 PERB 1520 (1973).)

Also excluded as a mandatory subject are such issues as the abolition of 140 teaching positions, or about 20% of the professional staff. With regard to the last item the Board stated:

> A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to

> eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees. Here there must be noted a substantial difference between private employers and public employers, for the latter 'owe a very special obligation to the public not owed by private employers...' (fn. omitted)

City School District of the City of New Rochelle v. New Rochelle Federation of Teachers, Local #280, AFT, AFL-CIO, 4 PERB 3709, 3706 (1971).

The Appellate Division has upheld a decision of the Board that class size need not be a subject of negotiations:

> Mandatory negotiation of numerical class size would necessarily involve mandatory determinations of the number of classes, and ultimately it would constitute negotiation of capital construction. This is not to preclude the negotiation of the impact of the board's determination of numerical class size must be a permissive item on the part of a board of education.

West Irondequoit Teachers Association v. Helsby, 42 A.D.2d 808, 346 N.Y.S.2d 418, 419 (1973). But with this quote the court left open the possibility of indirect union control of curriculum policy. While curriculum policy and matters directly related to the ability of the board to control the policy are not the mandatory subjects of negotiations, the impact of board decisions upon working conditions is a mandatory subject of negotiations. Thus, if a board unilaterally decides that class size should be 100, it still must negotiate the question of work load, that is, the number of teachers to be assigned to the class. Similarly the massive budgetary cuts and the reduction of 140 teaching positions in New Rochelle could be made unilaterally but the implications of these decisions upon the work load of the remaining teachers had to be collectively negotiated.

Despite the fact boards are not under any legal requirement to negotiate curriculum policy, some New York unions have managed to get school districts to do so. In New York City the union negotiated and obtained agreements on the establishment of special schools and programs of compensatory education as well as agreement on disciplinary policy. (See Section on New York City below.)

Other districts have agreed that teachers are to play a special role in planning and advising on basic educational policies, curriculum revision, and program evaluation. (Board of Education of the School District of the City of Niagara Falls, New York v. Niagara Falls Teachers' Association, 4 PERB 6628 (1970).)

To date the question of what item is a matter of management prerogative, and what is a "term or condition of employment," has been settled case-by-case. In reaching their decisions, neither PERB nor the courts have offered any guidelines for deciding what item belongs in which category. What appears, however, to be the underlying policy is the following: those items which directly affect (and this is always a question of degree) the nature, quality and quantity of the service being provided by the public schools, that is those matters have the most direct bearing upon the experiences of children in the schools, are not mandatory topics of negotiations; in contrast, those items or those aspects of general policy which most directly affect whether an individual will become and remain a teacher in a given school system--especially if the item can be quantified in terms of money, and/or time--are mandatory topics of negotiation. If this distinction is roughly accurate what it points to is an attempt by PERB and the courts to strike a balance between the rights of the public as represented by the board to maintain democratic control over those matters that are most clearly a question of public policy, e.g., purposes and methods of education, while recognizing the rights of the employees to attempt to influence those factors which serve to induce them to become and remain employees of the schools.

E. Parents

The rights of parents to influence the curriculum of the school, beyond the general right of participating in the electoral politics of the district, can be divided into two categories: (i) Rights to obtain a remedy which affects only the parent's child, and (ii) rights to obtain a remedy which affects other children in the school.

(i) The more important of the parental rights fall in the first category and include the chance to appeal decisions of the school to assign their children to specific courses and programs. As we have seen, the chance to appeal does not necessarily assume any likelihood of prevailing--neither the Commissioner nor the courts as discussed above are eager to intervene with regard to such assignments of pupils. Parent's also have the right, under Education Law Section 3210 and Commissioner regulation to obtain the release of their children for one hour a week for religious education and exercises. And they may seek to have their children excused from health and hygiene courses on religious grounds. (Education Law, Section 3204(5).)

Parents of physically handicapped children (which includes children with brain damage whether congenital or the result of an accident) have an important additional means of assuring the provision of adequate services for their children. Under Section 232 of the Family Court Act parents of such children may seek an order from the Family Court charging the county (or a proper subdivision thereof) with the costs of providing private educational services for the child when the child is in need of "special educational training, including transportation, tuition or maintenance, and, except for children with retarded mental development, home teaching and scholarships..." Courts in construing this provision have stated that the term "special educational training" means that the parent is to obtain a court order for money for private education only if there is no public facility available to meet the child's needs. (Matter of Richard C, 75 Misc. 2d 517, 348 N.Y.S.2d, 42 (1973).) Thus in seeking public funds for private educational services, parents in effect mount a collateral attack upon the adequacy for their child of existing public services.

The issue is joined when the county or other unit of government that might be charged with the cost of providing the private education resists and argues adequate public services are available. When this occurs, the family

court is forced both to assess the educational needs of the child and the adequacy of the available public services. The courts are thus thrown into the position of being educational experts who must decide what is the appropriate educational service for a given child.

In several cases this task has been simplified by the unusual features of the case. In Matter of Peter H., 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (1971), petitioner's son had been enrolled for three and a half years in a public special education class and had made no educational progress during the entire time. Subsequently he was withdrawn and placed in a private special educational school where he had "made remarkable progress at school, [had] gained a great deal of self-confidence and now is much happier with himself." (p. 1099) Petitioner sued for the payment of $1600 of the tuition (the State department of education had under Section 4407 of the Educational Law already agreed to pay for $2000 of the $3600 tuition). The County resisted the claim in the ground that special educational services of the type needed by the child were about to be offered starting in the fall of 1971 by the City of Mt. Vernon Board of Education. The court decided to award the petitioner's claim saying it was favorably impressed with the progress the child had made in the private school and that it "cannot permit his entire future to be jeopardized by gambling on a special educational system that has yet to prove itself." (p. 1099)

In Matter of Hilary M, 73 Misc. 2d 513, 342 N.Y.S.2d 12 (1972), Hilary had been attending private school for three years and had been obtaining sate aid pursuant to Section 4407 as a result of a recommendation to the state by the District Superintendent of schools of the First Supervisory District of Erie County. The district superintendent refused to approve a similar application for funds for the 1970-71 school year. The evidence indicated that 15 year old Hilary had made good progress in reading in the private school, that the private school could offer him extra-curricular activities which the public

program could not and that the private school provided him with 24-hour closely regulated care. The public officials argued the extra-curricular activities were not needed in this case, that the child could function in the public classes and that at the minimum he would not be harmed by the public classes. In reply the parents, as well as two court-appointed experts, said that Hilary needed the 24 hour care, and that the situation in the public school would be anxiety producing for him since he would be forced to mix with normal children when outside his special classes. The court granted the parent's request for the money on the grounds that the public officials had not clearly established that either Hilary had so improved in the private school he could now handle the public school situation or that the public school services had so improved since Hilary started in private school that he should be transferred.

The courts' decisions in the above cases were made easier by the fact that either the child had attended the public school and made no progress and/or attended the private school and made great educational progress. A more difficult problem is presented for the court when the child has had no experience with either a public or private facility. Thus in Matter of Richard C., 75 Misc. 2d 517, 348 N.Y.S.2d 42 (1973), Richard, who had been adjudicated a juvenile delinquent several times, was released from Wassic State School and his parents sought public money to support his attendance at a private school. The city of New York resisted on the ground that if the petition were granted "every juvenile delinquent would qualify for Phillips Exeter Academy or the Choate School." (p. 521) The court, however, granted the claim, apparently because the state school officials testified that Richard needed a residential facility and had only been released upon the understanding that he would attend such a facility.

Thus, to date, some of the more difficult issues that could arise under these statutory provisions have not yet reached the courts. For example, may

a parent of a physically handicapped child obtain money for private services if he has been enrolled in a public program, has made some progress but, say, not as much as similar children located in private facilities? Does a claim for public money lie only if the public services are totally ineffective? What if the child has been enrolled in a public program, has made no progress from the time he entered and there is no evidence to show that the available private schools could in fact do any better? May the parent obtain state support on the mere hope the private facilities may do a better job? Or must the parent first enroll the child in the private school on the gamble he will make progress, then once progress has been proven, seek public support through the courts? What happens if the public schools argue that placement in the public school program in which the handicapped child mixes with normal children is better psychologically than separation in a special private program, whereas the parents and their experts argue the child emotionally must remain separated from normal children? In all these cases the court's problem is exceedingly difficult.

Having granted parents of blind, deaf, and physically handicapped children the opportunity to demand that public schools provide adequate services or that public money be provided for the support of a private education, the question arises as to whether parents of other children--the mentally retarded, "slow learners," emotionally disturbed, the exceptionally intelligent, and even the normal child-- may not also claim equal treatment and the same opportunity to find suitable educational services. In other words, does the possibility exist that parents of other children successfully may mount an equal protection challenge to the state's denial to them of the rights granted exclusively to parents of physically handicapped children? Such a challenge would have to contend with the rational basis equal protection test pursuant to which a legislative classification is not to be struck down unless wholly irrational.

(Jefferson v. Hackney, 406 U.S. 535 (1972); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).) Under such a doctrine it is likely that the legislature could assert in a successful defense that there are rationally based distinctions between on the one hand, the blind, deaf and physically handicapped and mentally damaged children and, on the other hand, mentally retarded or educationally disadvantaged children. For example, it might be asserted that while we have some knowledge as to how to educate the physically handicapped, our knowledge as to how to educate the educationally disadvantaged is considerably less. We should wait until we know more about educating the educationally disadvantaged before recognizing legally based claims for an adequate education. Indeed we already have seen in McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom. McInnis v. Ogilvie, 394 U.S. 322 (1969) that the courts have turned down a claim that education constitutionally must be provided in accordance with need. And the state might argue it at least has taken a partial step toward assisting other kinds of handicapped children in Section 4407 pursuant to which the Commissioner may authorize state payment of up to $2000 of educational expenses in a private facility for any kind of handicapped child for whom there are no adequate public facilities. Of course the provision of $2000 still does not provide for completely equal treatment, as normal children enrolled in the public schools get the full cost of their education paid by the state whereas the $2000 may represent only part of the tuition at a private school. (See MacMillian v. Board of Education of State of New York, 430 F.2d 1145 (2 Cir. 1970).)

Perhaps a more fruitful approach for those not given any tuition or only partial tuition to private schools would come through an attack based on Article II, Section 1 of the State Constitution which requires the state to provide for the maintenance and support of a system of free common schools

wherein all children may be educated. The phrase "wherein all children may be educated" (emphasis added) seems to suggest that all children, regardless of special needs, must be provided programs pursuant to which they have a reasonable chance of being educated. But the term "common schools" (emphasis added) suggests that the schools to be established by the state need not develop programs for the uncommon child. However, the term may most naturally be read simply to mean belonging equally to all, i.e., a place where all children may go. Hence the provision might be read to require the state to provide schools open to all where all may be educated. A program that is not suited to the needs of certain children, then, is hardly a program that satisfies the constitutional requirement that it be a school where all may be educated. It would seem either the school program has to be changed or tuition payments have to be provided to cover the full costs of a private education suited to the needs of the child.

(ii) Parents are frequently interested in obtaining a change in school policy which will affect other children besides their own. One way a parent can act on this general concern is to seek judicial review of the policy. The threshhold difficulty a parent faces, however (apart from the issues of scope of review and the substance of the question raised), is the issue of standing. On the one hand, in Zorach v. Clauson, 303 N.Y. 161, 100 N.E.2d 463, aff'd 343 U.S. 309 (1952) parents have been given standing to challenge a released time program under which students could, if the parents so requested, be released for no more than one hour a week to attend religious exercises and education at private facilities located off the school grounds. In that case, the parents who challenged the practice--which the courts found not to be violation of either state or federal constitutional provisions prohibiting the establishment of religion--were not directly affected by the policy. In Engle v. Vitale,

18 Misc.2d 659, 191 N.Y.S.2d 45 (1959), aff'd 11 A.D.2d 340, 206 N.Y.S.2d 183 (1960), aff'd 10 N.Y.2d 174, 218 N.Y.S.2d 659, 176 N.E.2d 579 (1961), cert gran 368 U.S. 924 (1961), rev. 370 U.S. 421 (1962), parents also were given standing to challenge on constitutional grounds the use in the schools of a state-drafted prayer.

There is a difficulty, however, in placing too much reliance upon these Establishment Clause cases for establishing the proposition that parents can obtain standing to challenge on constitutional grounds curriculum policy which affects all children in the school. The Establishment Clause is unusual in that it explicitly defines a public or political injury so that everyone has been wronged in their capacity as citizen. Although no one has been wronged any more or less than any other person, the grant of standing to parents in these cases is given because citizens are given a unique constitutional protection in this one instance. Standing to raise an Establishment Clause challenge may be a unique feature under the Constitution; standing to challenge state action under other provisions of the U. S. Constitution is not so easily obtained. (United States v. Richardson, 41 L. Ed.2d 678 (1974); Schlesinger v. Reservists to Stop the War, 41 L. Ed.2d 706 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968).)

Having said this we should recognize the taxpayers, as will be discussed below, have been having an increasingly easy time in New York courts in obtaining standing, especially with regard to challenges under the state constitution. Thus, it may be that parents would have as easy a time in New York courts if they were seeking to overturn policy based on a provision of the state constitution. It would also seem parents would have little difficulty in obtaining standing to seek review of school policies pursuant to Article 78 but as the next case shows, the task may be more difficult than first appears to be the case.

Parents have had trouble obtaining standing to educational policy on non-constitutional grounds. In Oliver v. Donovan, 32 A.D.2d 1036, 303 N.Y.S.2d 779 (1969), parents of children enrolled in Public School 27 sought a petition to compel the superintendent of schools to exercise "informed discretion" to determine whether disciplinary hearings ought to be brought against the principal of School 27. The parents charged the principal with seventeen specifications of misconduct and incompetence. As to some of the charges related to educational decisions made by the principal the court ruled the parents had no standing. "However, the remainder of the allegations indicate that respondent Cooney [the principal] has tolerated and condoned physical abuse of students and has failed to take action against an allegedly 'alcoholic' school employee whose conduct is a continuing hazard to the health and safety of the children of the school. No fewer than seven assaults against children by school officials are alleged including several requiring medical care and attention. It is contended that Miss Cooney, as principal of the school has failed and refused to take disciplinary action against the school employees responsible and has accepted patently inadequate explanations of their conduct in complete vindication of their behavior." With regard to these questions the court concluded the parents did have standing:

> It is our view that this presents a judicially cognizable injury. Petition has the duty to send her children to the public schools and the concomitant right to expect that they will not be subject to physical abuse and danger at the hands of the very school officials to whom petitioner has entrusted her children. (citations omitted.) However, parents do not enjoy a general power of supervision over the school authorities. Complaints pertaining solely to matters within the administrative expertise of the educational officials involved are not judicial cognizable. Proper avenues of appeal are available and the parent is constrained to employ them. (cf. Education Law Sec. 310). On the other hand, where, as here, the parent alleges that her children are daily being exposed to conditions which threaten their health, safety, and welfare, a very different situation prevails. It is unnecessary for petitioner to allege that any of her children have been assaulted. In fact, it is the presence of impending or threatened injury which is the very basis of standing to sue.

Having said this, the court nevertheless dismissed the complaint without prejudice because it failed to meet the degree of specificity required in pleadings under Article 78.

There are several ways the distinction drawn by the court might be characterized and explained. The court might merely have been drawing a distinction between claims of injuries to legally protected interest of the complaining individual (or his child), e.g., a right to be free of negligently provided facilities and services, and other claims such as those arising under the Establishment Clause. Second, the court might have been drawing a distinction that rested ultimately on an understanding of the limits of its own competence. Courts can easily, and have for some time, been able to decide when school facilities and services have been provided negligently so that the health and welfare of the child is in danger. These kinds of decisions are not nearly as difficult to settle as whether purely educational decisions have been reached competently and without negligence. Because of their felt lack of expertise, courts are reluctant to review the schools' carrying out of their educational function as opposed to what might be called the "host function," thus the courts have drawn a distinction and granted standing only in cases involving a challenge to a school's handling of its host function. (The term "host function" is from Stephen Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 U. Pa. L. Rev. 373 (1969). For a discussion of suing schools for negligence and fraud in providing the educational program see Stephan D. Sugarman, "Accountability Through the Courts," 82 School Review 233 (1974).)

Parents have had little trouble obtaining standing before the Commissioner to seek review of general school policies with a view to obtaining a

change in the policy as it affects all children in the school. (Matter of Scism, 11 Ed. Dept. Rep. 172 (1972).)

Parents have in the past tried other avenues of attacking school policy. Thus, parents in the case In Re Skipwith 14 Misc., 2d 325, 180 N.Y.S.2d 852 (1958), refused to send their children to two junior high schools and prosecution of the parents was sought by the school district on the ground of neglect. The parents asserted by way of defence that both schools which were nearly all black were educationally inferior to other schools of the city which were nearly all white. The condition of inferiority the parents said violated the Equal Protection Clause and that for the court to force the parents to send the children to these schools would be a further violation of the Clause. The court agreed with the defense saying that to find the parents in neglect, then to remove the children from the parents' custody and to fine and imprison the parents for violating the compulsory education law would mean one arm of the State--the Court--was blindly enforcing the unconstitutional denial of rights by another arm of the State--the Board of Education. "These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education." (p. 873.) This conclusion rested upon a finding by the court that while the segregation of the pupils was not the product of state action, nevertheless, the separation of the races "creates factors inimical to the full and equal educational opportunities" and a finding that state action was the cause of the unequal quality of the teaching staff available in these schools as compared to the schools 85% or more white. In the two junior high schools in question, as well as in other junior high schools in which the student population was 85% or more non-white, the teaching staff was typically made up of fewer licensed teachers, and more substitute teachers. Specifically the court found that in one of the

junior high schools of 85 teaching positions there were 43 academic vacancies filled by substitutes, a percentage higher than found in the predominantly white schools. Despite efforts by the district to correct these problems, the discrepancy remained because under a school district policy teachers were allowed to choose their assignments. The court ruled that the teachers could choose their own assignment was no excuse for the board as it must be held responsible for the choice of its agents.

The opinion forces the same choice on government that the Wyatt case discussed above did. (See Section V.A.1.) Government must choose between compelling a child to go to school and offering the child what is constitutionally defined as an acceptable education, and letting him go. Thus two courts have said that government may not incarcerate non-criminals without providing them with something of positive benefit: simply because getting these people--the mentally retarded and children--out of the way may be convenient for the rest of the pupulation but this is not sufficient justification for such an invasion of individual rights. Both courts are speaking in the grand tradition, which holds that society cannot sacrifice the rights of some for the benefit of others.

But while this aspect of the decision makes sense, the Court's approach to the definition of what constitutes an inferior education leaves something to be desired. Second, the court rests the definition of an inferior education upon the single measure of the number of regular licensed teachers versus the number of substitutes in the school. It is not at all certain that this one figure is either a proxy measure for a truly important factor contributing to an inferior achievement score or that substitute teachers themselves are a cause of lower achievement scores. Third, the board did argue it was attempting to compensate for some of the problems in the schools by adding

two remedial teachers to the school. This, and perhaps other efforts to be made in the future, might overcome any detrimental effects of relying upon substitute teachers; but by using the one measure of quality the court foreclosed the use of these techniques for improving the program, and thereby reduced the flexibility of the school board to meet the problem. Fourth, to recognize the withdrawal of the students from all schooling as a technique for combating inferior schools may result in innumerable parents doing the same thing with the result of producing innumerable suits all relitigating the same question if authorities insist on taking each parent into court. Finally, the school district might simply choose not to prosecute parents who withdraw their children from school thereby leaving the children without a school, and avoiding any judicial review of the parental complaint. (Comments here heavily based on Kirp, "The Poor, The Schools, and Equal Protection," 38 Harv. Ed. Rev. 635, 654 (Fall 1968).)

An ironical footnote to Skipwith is the case of People ex. rel. Williams v. Shanker, 58 Misc. 2d 147, 295 N.Y.S.2d 10 (1968). In that case parents whose children had been excluded from the public schools because of a teachers' strike sought enforcement of the compulsory attendance law against the union. The court found that the parents had no standing to bring the suit as Section 3234 of the education law empowered only the Commissioner and boards of education to enforce the law. What the court might also have mentioned is that strikes by teachers in New York are illegal and that the legislature has established procedures and institutions for handling an illegal strike. (Civil Service Law, Article 14.)

F. Students

Students, like their parents have been given no specific right as students, to participate in control of school curriculum. Indeed, since most elementary and secondary students are below voting age they do not even enjoy the general

rights of citizens to influence school policy with their vote. But students are not without any rights. Most importantly, like their parents, it appears that under New York law students may at the discretion of the courts seek a review in the courts of their assignment to a particular course or program even without parental consent to such a claim for review. While Section 321 of the Civil Practice Law and Rules bar minors from prosecuting an action in person or by an attorney, Section 1201 of Article 12 provides:

> Unless the court appoints a guardian ad litem, an infant shall appear by guardian of his property or, if there is no guardian, by a parent or, if the parents are separated, by the parent or other relative having legal custody, and a person judicially declared to be incompetent shall appear by the committee of his property. A person shall appear by a guardian ad litem if he is an infant and has no such guardian or parent, or if he is an infant or person judicially declared to be incompetent and the court so directs because of a conflict of interest or for other cause, or if he is an adult defendant incapable of adequately protecting his rights.

And Section 1202 provides that the court may appoint a guardian ad litem upon its own initiative or upon the motion of an infant, if he is more than fourteen, a relative, friend, or any other party to the action if a motion has not been made under the preceding paragraphs within ten days after completion of service. Thus, while the law does not permit an infant to appear in court without assistance of an adult, the infant may be allowed to appear without his parents' consent if the court on its own initiative appoints a guardian ad litem or upon the motion of the people mentioned in 1202.

The cases which have arisen involving these provisions have largely dealt with wills, estates, and torts. But one recent case throws light on the extreme breadth of the provisions and the real possibilities of a student obtaining standing in the courts without his parent's consent. In Byrn v. New York City Health and Hospital Corporation, 38 A.D. 2d 316, 329 N.Y.S.2d 722 (1972) the issue was

raised of the constitutionality of the recently adopted state law on abortion. Subdivision 3 of Section 125.05 of the Penal law provided that an abortional act is justifiably committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life or (b) within 24 weeks after the commencement of her pregnancy. The lower court granted a motion of Robert M. Byrn to be appointed guardian ad litem for the infant "Roe" and all similarly situated members of a class of unborn infants of less than 24 weeks gestation scheduled for abortion in public hospitals under the operation and control of the defendant. The lower court also granted a preliminary injunction pending trial on the grounds the guardian had established a strong likelihood he would ultimately prevail on the merits. In reversing the Appellate Division concluded that the law was constitutional and the preliminary injunction should be denied. Before reaching that question, however, the Appellate Division decided the issue of the propriety of appointing the guardian ad litem. The court held the appointment was proper when made. (p. 323) In reaching this conclusion the court discussed several issues having to do with whether the case was a proper case for a class action, laches, and whether all necessary parties were before the court. Those questions will not be discussed here. As for the narrower issue of the interpretation of Section 1201 and the appointment of a guardian ad litem, the court first disposed of the argument that the fetus was not a "person" with rights to which a guardian can protect. This argument the court said went to the merits of the case and in an extraordinary case of this sort the court was not going to try the merits before the appointment of a representative with standing to seek injunctive relief. (p. 322).

As for the appointment of the guardian without notice to the prospective mothers and putative fathers the court said: (p. 322)

> There is, however, a manifest conflict of interest between the mother and the fetus about to be terminated. The father's consent to the abortion is not required under the statute and the reasonable inference is that he is either in accord with the mother's wishes or, at least, not effectively opposed. A court is not required to wait for the natural guardians to appeal before appointing a guardian ad litem if to do so would constitute a danger to the infant's interests.

This case thus makes clear that when the courts deem it is in the interest of the child to appoint a guardian ad litem to prosecute a case which the parent is opposed to the child prosecuting, the courts will do so. Hence, a student has no guaranteed access to the courts but it is within the courts' discretion to provide such access. To this extent students may have an important way of influencing the decisions of schools as to their placement in particular courses, programs or schools.

The only real support students have for a claim to be involved in curriculum policy is to be found in the pamphlet published by the State Education Department entitled, "Guidelines for Students Rights and Responsibilities." At the outset of the text the following statement is made: (p. 5)

> Increasingly school authorities recognize the importance of student participation in determining the nature of their education and are providing channels through which students can substantially contribute to determining which courses are taught, the content of the courses, and methods of evaluating both the courses and their own performance.
>
> Obviously the degree of involvement is a function of age, grade, maturity, and sophistication of students on one hand and the level and complexities of courses on the other. However, even if the student at a particular point is not skilled in content or curriculum design, he is the customer and consumer, and his opinions as to impact or probable impact of courses, course material and procedures can be extremely important and deserve careful analysis and full consideration.
>
> One constructive means of involving students in the planning and evaluation of curriculum and instruction is a faculty-student curriculum committee composed of student, faculty, administrative, and board of appointed representatives. Such a group could review existing curriculum offerings and explore possible changes and additions on an annual or other regularly established basis.

The pamphlet is only advisory, however, and is likely only to have an effect with those districts already inclined to involve students in curriculum planning.

No cases were found discussing whether students could obtain standing before the Commissioner if their parents did not join in the attempt to seek review of a school policy. Presumably the generally more conservative policy of the Commissioner with regard to granting standing points in the direction of a denial of standing to students in such a situation. (See discussion below on Taxpayers and Citizens.)

G. Taxpayers and Citizens

Other than having the opportunity to participate in the electoral politics of the school district, taxpayers and citizens have few claims to authority over the school curriculum. One vehicle available for the "community" officially to influence curriculum decision-making is through advisory committees required to be established in connection with approved occupational educational programs and the receipt of extra state-aid pursuant to three categorical grant programs. The grant programs provide money for educating pupils of limited English speaking ability, and pupils with special educational needs associated with poverty, and for the establishment of school-community interaction programs which should involve development of exemplary programs and projects designed to demonstrate ways of making a substantial contribution to the solution of critical educational programs. (Education Law, Section 4601, 3602; L. 1971, ch. 708, Section 2; L. 1973, ch. 720; Commissioner's regulations Parts 149, 153, 154.) In all the grant programs and the occupational education program the advisory committees are to advise with regard to planning, operating and evaluating of the programs. The membership of these advisory groups varies: the bilingual programs are to be advised by people living within the community "having particular knowledge or

experience relating to the educational needs of pupils of limited English speaking ability"; (Reg. 154.4); the umbrella projects are to involve interested citizens and groups, community school boards, community superintendents and school district staff (Reg. 153.3(b)(9); the programs directed to educational problems associated with poverty are to involve citizens, parents, pupils and groups within the community (Reg. 149.5(a)(9)). The advisory council in occupational education must consist of at least ten members familiar with the vocational needs and problems of management in the area, with occupational education, with manpower needs, the educational needs of the physically and mentally handicapped, and with the needs of the population to be served. (Educational Law, Section 4601(1).)

Beyond taking part in the electoral politics of the district and participating on the advisory groups established by statute and Commissioner regulation, citizens and taxpayers may attempt to seek review of a school district action or inaction in the courts. The New York law of standing is relatively liberal. A member of the public may obtain standing even when he is not directly and personally aggrieved if he raises an issue which is of interest to the whole community. (Andersen v. Rice, 277 N.Y. 271 (1938); see Carmody-Wait, 2d, Vol. 24, Lawyers Co-operative Publishing Co., Rochester, N.Y. (1968) Section 145:255 and cases cited herein.) In Egan v. Moore, 36 Misc. 2d 967, 235 N.Y.S.2d 995, reversed on other grounds, 20 A.D.2d 150, 245 N.Y.S.2d 622 (1963), a private citizen was granted standing to seek to stop the State University of the State of New York, Buffalo, permitting a ranking member of the Communist party, Herbert Aptheker, to speak at the University. When the Appellate Division reversed the decision to bar Aptheker, the court did so on the merits without reference to the question of standing explicitly decided by the lower court.

In Riesner v. Young, 198 Misc. 624, 100 N.Y.S.2d 488 (1950) a citizen and taxpayer was given standing to challenge the eligibility list for elementary school principals on the ground that the names had been placed on the list on the basis of a field test and appraisal of record which was not competitive, hence in violation of the state Constitution, Article V, Section 6, which requires civil service appointments to be based as far as practicable upon competitive examinations. (Also see Andersen v. Rice, 277 N.Y. 271 (1938).)

However, in Baer v. Kolmorgen, 14 Misc.2d 1015, 181 N.Y.S.2d 230 (1958), taxpayers were not allowed to bring suit to challenge the erection of a nativity scene on school property. A parent in the school was given standing to seek a declaratory judgment.

Taxpayers in New York city seem to have obtained from the courts a basis for standing generally denied to taxpayers in any other school district. While in most cases taxpayers have been denied the use of General Municipal Law 51 to challenge school acts (the law grants taxpayers the right to challenge the waste of money by municipalities), on the grounds that a school district is not a municipality within the meaning of the state (Schnepel v. Board of Education of City of Rochester, 89 N.Y.S.2d 793, 195 Misc. 371, aff'd 94 N.Y.S.2d 838, 276 A.D. 943, appeal denied 96 N.Y.S.2d 309, 276 A.D. 1053, aff'd 302 N.Y. 94, N.E.2d 617 (1951); but see, Stein v. Brown, 125 Misc. 692, 211 N.Y.S. 822 (1925), the Court of Appeals has given taxpayers in New York city the right to use the statute to gain access to the courts. (Lewis v. Board of Education of City of New York, 258 N.Y. 117, 179 N.E. 315 (1932).) The decision apparently was no accident for in a subsequent case, Lederman v. Board of Education of City of New York, 95 N.Y.S.2d 466, 196 Misc. 873, reversed 96 N.Y.S.2d 466, 276 A.D. 527, aff'd 301 N.Y. 476, 95, N.E.2d 806, aff'd Adler v. Board of Education of City of New York, 342 U.S. 485 (1952), taxpayers were given standing to

challenge the state's Feinberg and related laws designed to keep Communists off the public payroll. (Civil Service Law, Section 12-a(c); Educational Law, Section 3022) The question of standing was explicitly decided by the trial court in favor of taxpayers in that case and against the teachers with regard to whom the law was directed. (At the time of the trial no teacher had yet been refused employment because of his beliefs.) When the Appellate Division reversed the decision of the trial court which overturned the law on constitutional grounds, it, as neither did any of the subsequent courts reviewing the case, including the Supreme Court, made no reference to the issue of standing. (The Adler case was ultimately in effect overruled by the Supreme Court in Keyishian, op. cit.)

Why taxpayers in New York City are permitted to sue under General Municipal Law 51 while other taxpayers are not is not clear. In the original case extending the statute to New York City taxpayers (Lewis v. Board of Education of City of New York, supra), the Court of Appeals laid stress upon the facts that the school district was fiscally dependent upon the municipality, that the funds of the district are in the custody of the municipality, and that appointments to the Board are made by city officials. But a basic case denying the extension of the same statute to other districts involved the school district of Rochester which also was fiscally dependent upon the city. Perhaps the fact that the members of the board were not appointed by city officials made the difference. In any event, since the time of Lewis and Lederman decisions, the governing relations in New York City have undergone a drastic change as a result of the adoption of the new decentralization law. (See discussion of law below.) While the entire system remains fiscally dependent and the city board members are today still appointed, every community board, which enjoys considerably autonomy, is elected locally. Whether these developments undermine the decisions giving New York City taxpayers standing under Section 51 is not clear.

Finally we need to take note of an important recent decision which overruled a line of precedent which had held taxpayers lacked standing to challenge the constitutionality of enactments of the state legisiature. (St. Clair v. Yonkers Raceways, 13 N.Y.2d 72 (1963); Matter of Donohue v. Cornelius, 17 N.Y.2d 390 (1966); Posner v. Rockefeller, 26 N.Y.2d 970 (1970).) In Boryszewski v. Bridges, Docket No. 266 (Slip Opinion) the Court of Appeals decided it was necessary to bring in line the doctrine of standing as it applied to challenges to actions of local government and the doctrine of standing as it had developed with regard to challenges to enactments of the legislature. The court said in liberalizing the standing doctrine that it made little sense to exclude taxpayers from the courts when every effort was being made to encourage taxpayer involvement in government. (Ironically, denying taxpayers standing might be the better way to get taxpayer involvement in the political process.) And the court said it should no longer exclude the very people who were most likely to want to invoke the courts' powers.

From all these cases we may conclude that taxpayers apparently will have no trouble in obtaining standing to challenge state or local policy on educational matters if the challenge is based on a provision of the state constitution. We have also seen in one case, Egan v. Moore, op. cit., that a taxpayer was given standing in a non-constitutional case to challenge a decision of a state university. How generous courts will be in the future in granting standing in non-constitutional cases dealing with the school curriculum, however, remains to be seen. We have seen that parents have had trouble in obtaining standing in such non-constitutional cases and presumably the task would be even tougher for the ordinary taxpayer or citizen who can claim no unique injury which differentiates him from anybody else. At least the parent can claim an injury which sets him apart from all other taxpayers if not from all other parents.

In contrast to the success taxpayers and voters have had in gaining access to the courts, individual taxpayers, voters, and taxpayer associations have had no success in gaining access to the Commissioner. Over the years the Commissioner has consistently denied these petitioners standing as an "aggrieved" party within the meaning of Section 310 when they raise issues with regard to which they as taxpayers or voters have no nexus. The Commissioner has not been willing to open his offices to those taxpayers and voters who simply want to raise an issue of public importance which does not directly affect them as taxpayers or voters. (Matter of Donovan, 72 St. Dept. File No. 5670 (1952); Matter of Lebanon Valley Taxpayers Association, 74 St. Dept. 6 (1953); Matter of New York State School Nurse-Teacher Association, 4 Educ. Dept. Rep. 142 (1965).) The Commissioner has not explained his policy, an effort we might have expected of him in light of the liberal standing law of the courts.

VI. New York City

In 1969 in the aftermath of a bruising controversy over the Ocean Hill-Brownsville Demonstration Project, the state legislature adopted a school decentralization law for New York City that provided far less local control over education than the proponents of decentralization sought. Nevertheless, as drafted the law creates the potential for "community control" within a complex federal framework. The formal arrangements in New York thus are sufficiently different from the prevailing pattern of the state that a statement describing the arrangements with emphasis on the control of curriculum is warranted.

All the state laws substantially controlling curriculum in the schools, e.g., Section 3204, remain in effect but to the existing institutions for the control of curriculum the legislature has added new internal arrangements for New York City. At the city-wide level the Chancellor, who is to be hired by the city board, has the power and duty to: (Education Law, Section 2590)

> (8) Promulgate minimum edcuational standards and curriculum requirements for all schools and programs throughout the city district,

and to examine and evaluate periodically all such schools and programs with respect to

(i) maintenance of such educational standards and curriculum requirements and

(ii) evaluation of the educational effectiveness of such schools and programs; in a manner not inconsistent with the policy of the city Board.

The policies established by the Chancellor must be approved by the city board. (Education Law, Section 2590-G.) Beyond these general powers over curriculum the Chancellor is required to control and operate (i) academic and vocational senior high schools until such time as they may be transferred to appropriate community boards; (ii) all specialized senior high schools; (iii) all special education programs and services conducted pursuant to the chapter prior to the effective data of the article; (iv) any city-wide programs which regularly provide services to a substantial number of persons from more than one community-district (but community districts may offer similar services within the district). Additionally, the Chancellor can start new schools of the type just listed subject to certain requirements of consultation with the community boards. (Education Law, Section 2590-h(1) and (2).) Presumably these program responsibilities of the Chancellor are subject to the control of the city board as it is given the power to "determine all policies of the city district." (Education Law, Section 2590-g.)

Community districts, which are to be governed by a community board and a superintendent, are given the following powers and duties: (Education Law, Section 2590-e.)

Each community board shall have all the powers and duties, vested by law in, or duly delegated to, the local school board districts and the board of education of the city district on the effective date of this article, not inconsistent with the provisions of this article and the policies established by the city board, with respect to the control and operation of all pre-kindergarten, nursery, elementary, intermediate and junior high schools and programs in connection therewith in the community district. The foregoing shall not be limited by the enumeration of the following, each community board shall have the power and duty to:

> (3) determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials; provided, however, that such textbooks and other instructional materials shall first have been approved by the chancellor.

And Section 2590-i(14)(d) gives community boards the authority:

> (d) in the case of special funds allocated to the city district on a formula basis, to submit proposal to the chancellor for a review as to form only and prompt transmittal to the funding agency; provided, however, that in the case of such special funds community boards shall not be considered local educational agencies; and provided further that the total amount of such proposals submitted by any community board shall not exceed the amount of an apportionment made by the chancellor on the basis of a formula determined by the city board, after considering the recommendations of the chancellor and after consultation with community boards and the mayor, which formula reflects the same educational and economic factors as the formula for apportionment of such special funds to the city district;....

Further, each community is to receive its non-categorical funds according to an objective formula established annually by the city board but once having obtained its money the community boards are to make changes in the allocation of its own budget without prior approval of the city board or chancellor under general rules established by the city wide administration. (Education Law, Section 2590-i(8).)

As noted, basic control at the community board level over curriculum is vested in the community board which in turn may delegate such administrative and ministerial powers as appropriate to the superintendent, who in turn may delegate his powers and duties to subordinate officers and employees. Education Law, Section 2590-f(1)(b).) This explicit authorization to sub-delegate is a unique feature of the decentralization law which does not appear in the enabling acts of the other school districts in the state. Apparently the provision is designed to help assure the possibility of further administrative decentralization of the New York school system.

Finally, in an important departure from arrangements for the internal governance of other school districts in the state, section 2590-d provides:

> Each community board shall adopt and may amend by-laws, including but not limited to the following requirements:
>
> (1) that there shall be a parents' association or a parent-teachers' association in each school under its jurisdiction;
>
> (2) that the board, the community superintendent and the principal of each school shall have regular communications with all parents' associations and parent-teachers' associations within the community district to the end that such associations are provided with full factual information pertaining to matters of pupil achievement, including but not limited to: annual reading scores, comparison of the achievement of pupils in comparable grades and schools, as well as the record of achievement of the same children as they progress through the school; provided, however, that such record and scores shall not be disclosed in a manner which will identify individual pupils.

The Chancellor is also given the power and duty to "Establish a parents' association or a parent-teachers' association in each school under its jurisdiction to the extent practicable." (Education Law, Section 2590-h(15).) In addition to these provisions, community involvement is mandated by Sections 2590-e(11) and 2590-(i)(2) which call for public hearings prior to submitting to the Chancellor proposals for construction, remodeling or enlargements of buildings and prior to submitting a proposed budget.

It was inevitable that parents' associations and parent-teachers' associations having been established by law would seek pursuant to these provisions standing in the courts and before the Commissioner--an achievement other such groups had not been able to achieve. (See above.) But to date these groups have been successful only to the extent that they may seek to enforce in the courts or before the Commissioner the rights explicitly granted them in the decentralization law. They may not in other words, obtain standing to seek review in areas in which they have no statutorily defined role. (Parents Association of Public School 222k v. Community School Board of Local School District, 66 Misc. 2d 21, 319 N.Y.S.2d 864 (1971); Matter of P.T.A. of Samuel J. Tilden High School, 12 Educ. Dept. Rep. 177 (1973).) Also by way of dictum in Parents Association of Public

School 22k the court said the association did have standing to seek the construction and enforcement of Section 2590-e and any by-laws of the board dealing with the association's role in school affairs. (p. 25) The Commissioner also appears willing to extend the right to obtain standing for similar purposes to parent and teacher associations attached to schools run, not by a community school district, but by the city school board despite the fact that no statutory provisions grants these organizations any rights whatsoever. (Matter of P.T.A. of Samuel J. Tilden High School, 12 Educ. Dept. Rep. 177 (1973).)

Section 2590-1 gives the Chancellor authority to enforce all applicable provisions of law, by-laws, rules or regulations, directives and agreements. Hence this section gives the Chancellor the authority to enforce the minimum curriculum requirements established by himself and the city board. The Chancellor may enforce his orders by supersession of the community board with respect to those powers and duties of the local board deemed necessary to ensure compliance with the order and by suspension or removal of the community board. The community board or any suspended or removed member may appeal to the city board. (Education Law Section 2590-1)

Under Section 2590-g(10), the city board is to act as an appeal board to hear such appeals as the "commissioner of education, shall, by regulation determine." The Commissioner's regulations establish that the board shall hear appeals with regard to orders of the Chancellor pursuant to Section 2590-1. (Commissioner Reg. 113.2.) And Section 113.25 of the regulations permits an appeal to the Commissioner by any party aggrieved by the final determination of the city board.

[What the statutory scheme does not explicitly determine is when "an aggrieved person" complaining of an action taken by a community board must seek first a determination of the issue by the Chancellor, and then the city board acting as an appeal board before going to the Commissioner, and courts. Presumably on some issues the internal system of appeals must be exhausted prior to an appeal either to the Commissioner or the courts. In other cases perhaps an appeal might be taken directly to the Commissioner because the Chancellor and city board lack the authority to deal with the problem. And in yet other cases an appeal to the courts first is warranted because neither the Chancellor, city board, or Commissioner have the authority to deal with the issue.]

As was stated at the outset, the new decentralization law created the potential of community control; the extent to which that potential would be realized depended upon whether the Chancellor and city board were willing to exercise restraint in the use of the authority they were given under the law. The studies to date indicate a mixed picture. On the one hand, a survey of community board members and parents indicated they experienced few conflicts with the central board and Chancellor over curriculum or "indicated that these conflicts were less pronounced than those in personnel and budget." (Marilyn Gittell, et. al., School Boards and School Policy: An Evaluation of Decentralization in New York City (New York: Praeger Publishers, 1973), p. 80.) On the other hand, an article critical of the Chancelor and school board, while agreeing that the Chancellor and city board have not used their authority to set minimum education standards in a way effectively to control local curriculum (indeed, minimum standards have been set only for health and drug abuse education courses), pointed out several ways in which the Chancellor and board have hampered complete local control. (Michael A. Rebell, "New York's School Decentralization Law: Two and a

Half Years Later," 2 J. of Law and Education 1, 8 (1973).) First, the city board has continued the practice of establishing an approved textbook list from which community boards are to choose, as well as allowing schools and districts to recommend for approval to the Chancellor other books and materials. The city board bases its claim of a right to carry out this policy upon the provision quoted above, which gives the community districts the authority to select textbooks which "shall have first been approved by the chancellor." The Rebell article argues this arrangement "inverts the statutory scheme which clearly implies that textbooks should be chosen in the first instance by the community boards, subject to the approval of the Chancellor." (p. 8)

Until the practice was stopped by a New York state court, the city board also mandated that the community districts use a substantial portion of the funds they received from Title I of the Elementary and Secondary Education Act of 1965 for the continuation of certain programs which had been established prior to the decentralization law. The court barred the central administration from continuing this requirement basing its decision on an interpretation of Section 2590-i(14)(d) which, quoted in full above, provides that the city district may review programs funded by such grants "as to form only." (Community School Board, District 3 v. Board of Education, 66 Misc. 2d 739, 321 N.Y.S.2d 949 (1971) aff'd 38 A.D.2d 1932 (1st Dept. 1972).)

Of importance to note in connection with the use of Title I funds, for programs that pre-dated decentralization, the largest portion was devoted to the More Effective Schools [MES] program. Under this program a number of elementary schools in the ghetto were given the extra Title I funds so as to provide smaller classes, small group instruction, extra equipment and a full-time staff of social

service professionals. This program was established as part of a collective agreement with the United Federation of Teachers [UFT] and the court opinion in effect said the city board (which is the agency under law with which the UFT is to bargain) could not contract away control over these federal grants. The Rebell article also points out that the City Corporation Counsel had said the agreement on MES was not binding on the city as the provision appeared in the preamble of the contract and not in the body and that educational innovation and experimentation were matters about which the city board could not legally negotiate. (p. 10, note 25 citing Op. Corp. Counsel #107317, July 1971.)

As has previously been discussed, the Taylor Act by itself does not preclude a school board from negotiating curriculum policy, hence it is not entirely clear that the opinion of the Corporation Counsel is correct if we consider only the Taylor Act. But the decentralization law may have in effect wrought a change in the Taylor Act provisions on the scope of negotiations, so that the city board is not merely not required to negotiaite curriculum policy but it also is not permitted to do so. If the city board were permitted to negotiate detailed curriculum policy with the UFT, thereby withdrawing effective control of curriculum from the local boards, it could in this way totally subvert the intent of the decentralization law. At best it would appear that the decentralization law permits the city board to negotiate only minimum educational standards, a matter explicitly within the control of the city board. What exactly "minimum educational standards" are is not clear but presumably the phrase refers to general rules and criteria (1) that are applicable to all the community districts; and (2) that still leave room for the exercise of discretion by the community boards. These formal criteria of what a minimum standard is then provide the parameters of city board authority to negotiate with the UFT over curriculum policy.

The third way in which the city board has limited the local community districts has been by retaining "all available curriculum research funds for the numerous central bureaus which pre-dated decentralization." (p. 15.) As a consequence of this policy, the community districts are without funds with which to carry out research on curriculum innovation.

It might also be noted that the reviews undertaken of the implementation of the decentralization law reveals that the community districts are in fact operating a multiplicity of experimental and innovative educational programs. But many of these programs pre-date decentralization; there is no indication that these innovative programs have affected the basic educational program of the districts touching the large bulk of the children; and all standardized test scores indicate that the achievement level of the students continues to be low. (Gittel, op. cit; and Melvin Zimet, Decentralization and School Effectiveness (New York: Teacher's College College Press, 1973).) The obstacles to widespread and more effective changes appear, however, to be factors other than lack of community authority and interference from the city board and Chancellor. (Zimet, p. 117.)

Has decentralization meant an increase in community involvement in educational planning and what has been the effect of Section 2590-d quoted above? One assessemnt by Marilyn Gittel and several associates discerned three types of community boards - change-agent boards, active boards and status quo boards. Only two boards were placed in the change-agent category and these two boards also did make efforts to involve parent associations and the community in decision-making. As for one of the boards, the report states that parent associations and PTAs

became a "fulcrum" in the decision-making process on several issues including curriculum development. (p. 108) Six boards were placed in the active category. Among these districts the report indicates differences in the kind and degree of community involvement ranging from merely full implementation of the hearing requirements imposed by statute to consultation to program innovation as a direct result of parental involvement in the schools. Twenty-three districts were placed in the status quo category. Many of these districts are governed by boards dominated by whites with the result they are unrepresentative of either the district population as a whole or the school population. The result is frequent hostility between board and community and little community involvement in the schools. Even when a predominantly white board governs a predominantly white district the extent of community involvement was found to negligible.

Another study of specifically Community District #7 noted as to community involvement that the parents' association and PTA were most useful as training grounds for community leaders and board members but it seemed to suggest more influence was exercised on the board by organized interest groups. The central way in which the community was represented was through the diverse membership on the board. This fact lead to severe conflict within the board on ethnically sensitive issues, e.g., bilingual education which the Puerto Ricans cared about while the blacks were indifferent or hostile. Largely informal mechanisms kept the board in touch with the various ethnic and organized interest groups. Also much of the work of the board was done in executive session and out of view of the community. At the school building level efforts had been made even to get parents involved in textbook selection but the report concludes progress has been slow. All in all the report finds a substantial shift of power away from the professional staff to the community board and the community, but the central board remains a dominant factor. (Zimet)

Both studies summarized here are impressionistic and make no effort to use a quantified measure of community involvement, influence or power. As a consequence one comes away from both studies with the impression that the question of the degree of community involvement has not yet been fully dealt with. At best we can say at this time that in some districts because of factors not well identified or measured it does appear decentralization has resulted in significant new community involvement.

The most significant development appears, however, to be the creation of the community boards of education themselves. These boards are elected according to an election system called "proportional representation" which in theory is designed to assure that all reasonably sized groups will be assured of some representation on the board in contrast to the typical at-large election system under which a majority of the voters can control every seat on a school board. (Section 2590-c(6).) The reviews of the decentralization law indicate that the proportional representation system has only been partially effective in achieving its purposes. Many districts have elected boards with an ethnic-racial make-up rather different from the district. (The failure of the boards to be representative seems to be the product both of voter apathy, deliberate voter refusal to become involved in the elections, and efforts by the UFT to elect its own candidates to the boards. In the May 1973 election the UFT backed candidates in 19 of the districts and saw 93 of 171 seats in the districts filled with union-backed candidates. (New York Times, May 8, 1973).) In other districts the board has become a focus of conflict because it was representative of the conflicting ethnic groups within the district. (See commonets on District #7 above.)

In sum, decentralization does not appear to have "brought the community into the school" or the "school into the community" but has created a new institution--the community board--through which conflicting values may be resolved. To date the nature of the process spawned by the establishment of the boards is consistent with the kinds of political processes found in other school districts.

The community boards seem to function about as well as other school boards and if there has been more visible and heated controversy in some districts, that seems to be a logical outcome of the sheer heterogeniety of some of the districts. The boards have not on the whole reversed the general pattern of American politics of rather low political participation by vast bulk of the citizenry. Hence in the long run it seems doubtful that decentralization in New York will significantly change the usual relationship found in most school districts between the community and the professional staff. That usual relationship might be summarized as professional staff control over most of the details of school policy, perhaps as well as over some of the "medium" range policy decisions, with the general community values and mores providing the outer constraints which shape the long-term policy of the schools.

Similarly, the studies to date do not indicate that the decentralization effort has resulted in vast changes in curriculum policy. This fact is consistent with the continued and important role of the professionals who largely remain the same people who worked in the system prior to decentralization. Perhaps in the long term as turnover occurs in the professional staff, and professionals who share backgrounds, interests and goals more closely with the community they serve come into place, we shall see an evolution in the methods of instruction and the nature of the materials used if not the goals of the educational program. The goals of improving the basic skills in reading and arithmetic are likely to remain unchanged.

VII. Private Education

A. Parents and State: Standards.

The number and different kinds of statutes regulating the parent's guardianship of the child is large: neglect laws; compulsory education laws; abuse laws; support laws; criminal laws; welfare laws; and custody laws. For

these purposes, attention will be paid to the compulsory education laws and neglect laws as these are the most central to the question of state regulation of the parent's educational efforts.

Section 3205(1)(a) of the Education Law requires minors with certain exceptions from six to sixteen to attend upon full time instruction. Section 3204(1) permits the child to attend at a public school "or elsewhere." Taken together, Sections 3204(2) and 3210(2) require the child attending other than a public school to "attend for at least as many hours, and within the hours specified therefor" and require the instruction to be substantially equivalent "to the instruction given to minors of like age and attainment at the public schools of the city or district where the minor resides." (As noted below the mechanisms for enforcing these standards are weak and do not include any sort of mandatory licensing for private schools.)

The parent pursuant to Section 3212 (b) and (d) "shall cause such minor to attend upon instruction as hereinbefore required..." and "shall furnish proof that a minor who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that the minor is not attending." To whom proof must be furnished is not clearly established but presumably it is to the public school district in which the parent resides, since Section 3234 charges the local school districts with the enforcement of the compulsory attendance laws:

> The commissioner of education shall supervise the enforcement of part one of this article and he may withhold one-half of all public school moneys from any city or district, which, in his judgment, willfully omits and refuses to enforce the provisions of part one of this article, after due notice, so often and so long as such willful omission and refusal shall, in his judgment occur or continue.

Other provisions authorize local districts to hire supervisors of attendance, attendance teachers and attendance officers. As for the duties of these "truant officers," Section 3212, almost with tongue in cheek provides: "To the end that children shall not suffer through unnecessary failure to attend school for any cause whatsoever, it shall be the duty of each attendance teacher and each attendance supervisor to secure for every child his right to educational opportunities which will enable him to develop his fullest potentialities for education, physical, social and spiritual growth as an individual and to provide for the school adjustment of any non-attendant child in cooperation with school authorities, special school services and community social agencies." A parent who is in violation of these laws is subject to a small fine or short prison term. (Education Law, Section 3233.)

The neglect laws offer two definitions of a neglected child. Section 312 defines a neglected child as a male less than sixteen or female less than eighteen whose parent does not adequately supply the child with, among other things, education. Section 1012 defines a neglected child as a child less than eighteen

> (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care.
>
> (A) in supplying the child with...education in accordance with the provisions of part one of article sixty-five of the education law [the provisions outlined in the preceding paragraph of the text above]

If a child has been determined to be neglected the court has wide discretion in fashioning an order to suit the needs of the case, including removal of the child from the parent's custody.

Whereas the Family Court Act provisions cited immediately above do not make neglect a crime, Section 260.10 of the Penal law does create the crime of "endangering the welfare of a child" which a person is guilty of when

> (2) Being a parent, guardian or other person legally charged with the care or custody of a male child less than sixteen years old or of a female child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a "neglected child,"...as [this] term [is] defined in articles three and seven of the family court act.

This brief statutory review reveals the overlap among the provisions: a violation of the compulsory attendance laws also amounts to a violation of the neglect laws. However, a violation of the neglect laws can occur without a violation of the compulsory attendance laws even in situations related to the education of a child as when a parent is charged with neglect because of his own "immoral" behavior. Thus in Matter of Anonymous, 38 Misc. 2d 411, (1962) the court found the children had been neglected because the mother, separated from the father, had on several occasions entertained male companions for large parts of the day, and overnight, in the presence of her five children. In reaching a conclusion of neglect, the court provided this analysis of the law:

> Statutes often define in general terms. Decisional law particularizes and refers to a given set of facts. The statutory definition of neglect therefore, being in general terms, has resulted in a dearth of cases reported; and the tendency has been to leave it to the Judge in a particular case to make his own decision as to whether or not there is neglect, based upon the particular and unique set of facts in the case at bar. It therefore has devolved upon the courts to establish the moral standards to be followed by person to whom is entrusted the care and custody of children. And never has there been a greater need for the courts to maintain a high level of moral conduct than exists today. This court intends to give more than lip service to the principle that the fabric of society is composed of the family unit and when the family unit is damaged, the fabric of society suffers. Our courts will continue to insist upon a high level of moral conduct on the part of custodians of children, and will never succumb to the "Hollywood" type of morality so popular today, which seems to condone and encourage the dropping of our moral guard. We have not yet reached the point where, when parents who have tired of each other's company, may be free to seek other companionship with complete disregard of the moral examples they are setting for their children. This is the crux of the case at bar. (p. 412)

The contrast to the reaction of Judge Marcus L. Filley in the previous case, by Judge Ralph E. Cory writing in In Re T, 64 Misc. 2d 28, 314 N.Y.S.2d 480 (1970), could not be greater. In the case of T, the mother was charged with neglect for a variety of reasons (promiscuity, drug use, excessive drinking), but the court found that either the testimony against the mother was not creditable or that what she did, did not amount to neglect ("There is no proof that the mother had an excessive drinking problem, although there was some evidence that she drank

beer to excess, but far from conclusive to show it resulted in neglect of her children."[4] (p. 486.) Judge Cory also observed:

> A mother does not have to be an expert in the care and bringing up of children. She is not required to be a Dr. Spock. She is not required to be a professional nurse. She is not required to be the neatest housekeeper in the world. The mother's conduct may not have been perfect, and she exhibited a flair for a semi-hippie life. Who is going to judge the mores of the community today?...

These cases demonstrate that the neglect laws insofar as they permit state intervention on behalf of a child because of the "moral" education he is receiving are not well defined and leave the courts with enormous discretion to determine when there has been neglect.

The standard for making a judgment under the compulsory education laws (and thus also under the neglect) laws is somewhat more specific insofar as a reference point is made to the public school program in the district in which the child lives. The interpretation of the standard--the education must be substantially equivalent to that in the public schools--becomes an issue in two types of cases: (i) those cases in which the parents have educated the child at home; (ii) those cases in which the child has been enrolled in a private school often under the control of a religious organization. In both kinds of cases, the burden of proof of compliance with the compulsory education law rests with the parent.

In the first class of cases the parents have generally avoided conviction for several reasons. The courts have not required that the parent who educates his child at home have a teaching certificate. (People v. Turner, 227 A.D. 317 98 N.Y.S.2d 886 (1950).) At the same time the courts appear not to have examined too closely the actual extent to which home education was "substantially equivalent" to the education offered in the local public districts in which the children resided: the facts outlined in the opinions are at best sketchy suggesting

the courts have looked only at the number of hours of instruction and the textbooks used but not each of these factors is looked at in each case. (In Re Meyers, 119 N.Y.S.2d 98 (1953); People v. Turner, 227 A.D. 317 98 N.Y.S.2d 886 (1950).) Only in one case were the pupils tested to determine their level of achievement. (Matter of Walker v. Foster, 69 Misc. 2d 400 330 N.Y.S.2d 8 (1972).)

Those parents involved in the second class of cases, all decided prior to Wisconsin v. Yoder, 406 U.S. 205 (1972) have been less successful. In People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830, aff'd 278 A.D. 704, 103 N.Y.S.2d 757 (1951), aff'd 302 N.Y. 857, 100 N.E.2d 48 (1951) appeal dismissed, 342 U.S. 884 (1951), the children were enrolled in a private school devoted exclusively to the study of Jewish Law, the Talmud and the Bible. The court concluded the children were not receiving an education substantially equivalent to that available in the public schools and ruled that despite the claim of religious liberty the secular law must prevail. To let a religious claim prevail would open the door, the court reasoned, to claims for all kinds of exemptions by any number of possible religious groups. Similarly, in Auster v. Weberman, 198 Misc. 1055, 100 N.Y.S.2d 60 (195), aff'd 278 A.D. 656, 102 N.Y.S.2d 418 (1951), aff'd 302 N.Y. 855, 100 N.E. 47 (1951), appeal dismissed 342 U.S. 884, aff'd 278 A.D. 784, 104 N.Y.S.2d 65 (1951), the court ordered the father who had custody of the children to comply with the compulsory attendance law or lose custody of the children to the mother of the children. The father, as in the prior case, had enrolled the children in a Jewish parochial school. And in Matter of Currence, 42 Misc. 2d 418 248 N.Y.S.2d 251 (1963), the mother removed the child each week from the public schools from Wednesday afternoon through Thursday morning, the sabbath of the religious sect to which the mother belonged.

During that period the child attended a denominational school which had not been licensed or approved by the public authorities. With no further analysis, the court concluded the child was neglected.

Of importance in these cases was the fact that the children involved were of elementary school age and the courts, without saying so, had balanced the interests of the state in assuring elementary aged children of a basic secular education against the parental claims of religious freedom. As to analyzing the risks involved in granting an exemption, however, either the opinions are silent or they dwell upon an exaggerated parade of horribles including the fall of the rule of law in the face of claims of exemptions by every imaginable religious sect. Given these facts, it is unlikely even in a post-Yoder world that these decisions would come out differently.

There are several possible explanations for the generally different outcomes between the two classes of cases. First, it may very well be that the parents who were instructing their children at home actually did provide an education substantially equivalent to that which was offered in the public schools whereas the religious schools for religious reasons deliberately avoided providing such equivalent instruction. Secondly, the parents who kept their children at home often did so for reasons, which if adopted by other parents, did not threaten either the educational system or the system of laws. For example, in one case the parent instructed the child at home because no transportation to school was provided by the schools, the parent had no way herself to take the child to school and it was too dangerous for the child to walk by herself. (In Re Conlin, 130 N.Y.S.2d 811 (1954).) In contrast, in the cases involving private religiously oriented schools, exemptions from the compulsory education laws were being sought for reasons, which if accepted by the court, threatened to become a basis for many other claims for exemptions. Finally, in the home instruction cases, the courts seem simply to have been sympathetic to the problems of parents involved in the case, whereas the courts in the private school cases evinced no sympathy for the parents' viewpoint or position.

B. Parents: Right to Aid

Parents of certain handicapped children under various provisions of the Education Law have the right to seek financial support for their children in private schools. Several of these provisions have been previously discussed. (See above discussion of Family Court Act, Section 232; Education Law, Section 4407.) Mention should also be made of Education Law, Section 912 which provides in part:

> The voters and/or the trustees or board of education of a school district, shall provide resident children who attend schools other than public with all or any of the health and welfare services and facilities, including but not limited to health, surgical, medical, dental and therapeutic care and treatment, and corrective aids and appliances, authorized by law and now granted or hereafter made available by such voters and/or trustees or board of education for or to children in the public schools inso far as these services and facilities may be requested by the authorities of the schools other than public....

Despite the language in the statute stating that such services must be requested by the private school, several cases have recognized the claim of parents seeking enforcement of the section. In Cornelia v. Board of Education, 36 A.D.2d 576, 317 N.Y.S.2d 785, aff'd 29 N.Y.2d 586, 324 N.Y.S.2d 314, 272 N.E.2d 896 (1971), the public district was ordered to provide the child a course in speech therapy. And in Greve v. Board of Education of Union Free School District No. 27, 72 Misc. 2d 791, 339 NY.S.2d 697 (1973), the services of an itinerant teacher who "provide[d] instruction in auditory training, speech reading, language and speech development and supportive education or tutorial assistance in curriculum areas indicated by the individual needs of each student," were ordered to be provided to Micheal Greve. The court construed the term "therapeutic" as used in the section to include services given in an "effort to mitigate the effects of the deprivation and to permit them [handicapped children] to lead a life which resembles that led by a physically normal child..." (p. 701). Thus the court rejected the claim of the school district that only services directed to correcting an underlying medical defect must be provided. In any event the court pointed out the statute says there shall be provided "the health and welfare services

and facilities, including but not limited to health, surgical, medical and therapeutic care and treatment..." (Emphasis in the original.) (p. 702)

This provision of the Education Law can be seen as part of the general effort of the legislature to assure all children of an adequate education defined in terms of the quality of the education provided by the local public school district in which the child resides. Put differently, the legislature has attempted to implement the standard to which it holds the private school by requiring the public system to make these limited services available.

C. Private Schools: Mechanisms of Regulation

Prior to the Packer Institute decision discussed above, private schools were regulated under mandatory licensing requirements. Since that law was struck down for failure to incoporate sufficient standards, the regulation of private schools has been undertaken in four ways. First, Section 3234 places the burden of enforcing the compulsory education laws upon the local public school districts, hence the superintendent of these districts has the responsibility of determining if private schools are providing instruction which is substantially equivalent to that available in the public schools. In practice, however, these inspections are seldom made and if done so is a most cursory manner. Also, on request the state department will aid in any equivalency appraisal.

If a local school superintendent rules that the program of a private school is not meeting the substantially equivalent standard, an appeal may be taken to the Commissioner and then to the courts. The review by the courts will be based upon the arbitrary and capricious standard, thus the chances of obtaining a reversal of the Commissioner are slight. (Green Valley School v. Nyquist, 72 Misc. 2d 889, 340 N.Y.S.2d 234 (1971).) Of interest here is the question of the

standing of the school to seek review. Under one argument the school lacks standing as a determination that the education provided is not substantially equivalent affects not the school but the children and parents who thereby become vulnerable to prosecution under the compulsory education laws. On the other hand, the result of such a ruling may have the effect of driving the school out of business if the school does not change its program and parents remove their children from the school. In these circumstances the school is very much affected and may be given standing. These matters were not discussed in the Green Valley case since when the school appealed to the Commissioner his decision was that he did not have to reach the issue of whether the program met the substantially equivalent standard as the school was an out-of-state corporation which had not obtained authority in the first place to operate in the state. The court sustained the Commissioner's conclusion.

Secondly, in order to meet the standard of substantial equivalence, private schools must offer those courses which consist of the basic school program for all students in the state set forth in Section 3204, the Commissioner's regulations as well as those courses specifically required of public and private schools, such as the study of the United States and New York State constitutions. (Education Law, Section 801; Commissioner's Regulations Part 100.)

Thirdly, private schools which are foreign coporations not organized under the laws of the State of New York may not conduct business in the state unless authorized by the Commissioner. (Not-for-Profit Corporation Law, Section 1301, and 404; Green Valley School v. Nyquist, op. cit.

Fourthly, a private school which wishes to incorporate in the state must receive its charter from the Board of Regents. (Education Law, Section 216.) Once the school has been incorporated it becomes one of the institutions of the University (Education Law, Section 214) and becomes subject to the control and regulation of the Board of Regents. (Education Law, Sections 209, 210, 215.) There is no indication that the Board of Regents undertakes any sort of systematic regulatory effort.

Finally, private schools may voluntarily register with the Board of Regents. (Board of Regents Regulations, Sections 3.23, 3.30, Part 13.) Registration brings with it both some benefits and some obligations. The obligations include having to file an annual report and the seeking of re-registration every five years. To become registered the school must satisfy all the minimum requirements for New York schools but obtaining accreditation from the regional accrediting association is often taken as sufficient proof of compliance. The benefits to the school include being able to hold itself out as "registered," being able to offer Regents examinations and a Regents diploma. (For more information contact, Appleton A. Mason, Executive Director, New York Association of Independent Schools, (518) 463-0240.)

At one point the department of education attempted to circumvent the fact that it could not compel private schools to register by placing obstacles in the path of children attempting to enter public school from unregistered kindergartens. Public school officials were given the discretion as to whether to place in the first grade or kindergarten a child from an unregistered kindergarten even if that kindergarten were offering a program substantially equivalent to that offered in registered non-public schools and the public school kindergarten. Children from private, but registered kindergartens, were to be placed in the first grade. A court in Jokinen v. Allen, 15 Misc. 2d 124, 182 N.Y.S.2d 166 (1958), struck the regulation down as a violation of the Equal Protection Clause.

D. Parent Against Parent: Standard

Conflict between parents over the education of their children reaches the courts in the following ways: Suits by one parent to enforce an ante-nuptial agreement in which the parents as part of their divorce agreed to the proper educational program for the children. (Ramon v. Ramon, 34 N.Y.S.2d 100 (1942); Ex Parte Kananack, 272 A.D. 783 69 N.Y.S.2d 889 (1947); Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954); Paolella v. Phillips, 209 N.Y.S.2d 165 (1960).) Such agreements are binding upon the parents and will be enforced by the courts. Secondly, the conflict may surface when one parent seeks to obtain custody of the child from the other parent on grounds that the child is being educated in violation of the compulsory attendance laws. (Matter of Weberman, 100 N.Y.S.2d 60, 198 Misc. 1055, aff'd 102 N.Y.S.2d 418, 278 A.D. 656 (1951); aff'd 100 N.E.2d 47, 302 N.Y. 855 (1951), App. dis. 342 U.S. 884 (1951), aff'd 104 N.Y.S.2d 65, 278 A.D. 784 (1951).) Finally, the issue may be raised when one parent sues the other for continuation of support payments for the child's education or for an increase in payments. The most difficult support cases arise when the mother seeks to provide the child with a private education or a college education while the father resists having to pay support for such an education program. (Borden v. Borden, 130 N.Y.S.2d 831 (1954); MacFadden v. MacFadden, 17 N.Y.S.2d 118, 173 Misc. 85, rev. 263 A.D. 844, 33 N.Y.S.2d 815 (1942); Herbert v. Herbert, 98 N.Y.S.2d 846 (1950). Generally speaking the courts do not oblige the father to support the provision of private schooling or college, but the results can vary from case to case depending upon the income of the father and the particular needs of the children.

While courts have been and are willing to deal with parental conflicts over a child's education in these situations, the general rule for New York courts is that they will not intervene into the internal affairs of families that have not yet dissolved. This proposition was established by the Court of Appeals only after two lower courts had intervened in a case marked by an unusual conflict between the parents. Blanche Sisson, the mother of eight year old Beverly brought suit alleging that Beverly was a neglected child. Mrs. Sisson, who was an invalid and bedridden, alleged that her husband, Howard, with whom she lived in a common home, had for some time now been bringing Beverly up within a religious sect, Megiddo. Without the mother's consent, the father had taken Beverly from the home for weekends devoted to religious activities as well as for longer periods of time. The child was expected to dress in dresses with longer sleeves and hemlines than the prevailing fashion, was not permitted to listen to the radio, and was required to commit over five hundred biblical verses and other texts to memory. As a result of the training the mother alleged the child had become estranged from her mother, even telling Mrs. Sisson at one point that the person who first taught her the Megiddo religion was "her mother."

The case first went to Children's Court which found that pursuant to the neglect statute then in effect the child was not neglected. (Matter of Sisson, 152 Misc. 806, 274 N.Y.S. 857 (1934).) Next the mother tried the Supreme Court and there the court ordered that exclusive custody and control of the child be awarded to the mother on the ground this was in the best interests of the child. (

On appeal, the Appellate Division modified the order to assure equal and joint custody of the child by both parents, hence Howard Sisson was prevented from taking Beverly out of town to the Megiddo Mission without consent of the mother nor to take the child from the home for more than two hours at a time and then

only after personal notice to the mother of the intended absence and of the purpose and destination of the proposed excursion. (People ex. Rel. Sisson v. Sisson, 246 A.D. 151,

On appeal the Court of Appeals reversed the Appellate Division and wrote: (People ex. Rel. Sisson v. Sisson, 271 N.Y. 285, 287 (1936).)

> The court cannot regulate by its processes the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act.

The decision of the Court of Appeals is too brief to be fully satisfactory. We are told that the facts of this case do not warrant court intrusion and are provided a standard for mudicial review of these problems so general as not to be helpful, namely court intervention is permitted only when the parental dispute seriously affects the health or morals of the children. The most useful information which the standard provides is that New York courts are, unless the case involves extreme danger to the child, not to be available for settling family disputes over the religious education of a child.

F. Child Against Parent

New York law gives to the parents extensive control over a child and his education. First, parents are deemed to be the guardian of their children. Second, the compulsory education laws directly impose upon the child a duty to attend upon full time instruction. (Education Law, Section 3205(1)(a).) In turn it is the duty of the parent to assure that the child is in compliance with this provision. (Education Law, Section 3212.) A child who does not comply with the law and his parents' instructions is subject to several other provisions. First, he may be declared a "school delinquent" and with parental consent can be placed in special

schools or classes for school delinquents. (Education Laws, Section 3214.) Additionally, the Family Court on the motion of the parent may declare the child to be a "person in need of supervision" [P.I.N.S.] if he violates the compulsory attendance laws, is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority. (Family Court Act, Section 712.) If a child is labeled as a P.I.N.S. the Family Court has wide discretion in framing an appropriate order including confining the student to a state institution. Even the penal code permits a considerable use of physical force: (Penal Law, 35.10.)

> The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:
>
> (1) A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, and a teacher or other person entrusted with the care and supervision of a minor for a special purpose, may use physical force, but not deadly physical force, upon such minor or incompetent person when to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such minor or incompetent person.

Finally, in a recent case the Court of Appeals gave parents yet another method by which to exercise control over their college age children. For reasons that pre-dated the case in the Court of Appeals, Mary Roe, a 20 year old University student, was under the control of a court appointed guardian while her college expenses were being paid by her father, a prominent New York attorney, John Doe. Mary Roe attended college in Louisville, but contrary to her father's prior instructions and without his knowledge moved out of the college dormitory to take up residence with a female classmate in an off-campus apartment. When the father learned of the deception he cut off all further support. Continuing to ignore her father's demands, Mary sold the automobile her father gave her and lived off the proceeds of the sale.

Suit for continuation of the educational support payments was brought by Mary's guardian against the father. The Court of Appeals in denying the claim for support said: "The father has the right, in the absence of caprice, misconduct or neglect, to require that the daughter conform to his reasonable demands. Should she disagree, and at her age that is surely her prerogative, she may elect not to comply; but in so doing, she subjects herself to her father's lawful wrath. Where, as here, she abandons her home, she forfeits her right to support." (Roe v. Doe, 29 N.Y.2d 188, 194, 324 N.Y.S.2d 71, 272 N.E.2d 567 (1971).) To hold otherwise would be to allow, at least in the case before us, a minor of employable age to deliberately flout the legitimate mandates of her father while requiring that the latter support her in her decision to place herself beyond his effective control." (p. 193)

In sum, New York law provides the parent with an extensive arsenal for controlling his child from birth through college. During the period in which the child is of compulsory school attendance age (6-16), the parents' control is backed-up with a variety of coercive state laws. Once the child is employable, after 16, thus beyond the compulsory attendance laws, the ability to cut off support becomes possible. In other words, nothing in Roe v. Doe suggests that the decision is only applicable to 20 year old students in college: parents of 16 year old children who drop out of school and are employable and effectively emancipate themselves from their parents also may not be able to claim support from their parents, despite the requirements of Domestic Relations Law, Section 32 which makes a parent liable for support until a child is 21.

This last point is underscored by a New York policy to draw a distinction between parental duties toward a child under 16 and a child over 16. Criminal responsibility for support ceases when a child becomes 16. Penal Law, Section 260.5; also parents under New York law are required to contribute the support of a minor

under 16 institutionalized following a determination and order of the Family Court adjudging the child "delinquent or a person in need of supervision. (Family Court Act, Section 233.) A parent is not required by law to contribute to the support of wayward minors, age 16-21, or youthful offenders, age 16-19 who may be incarcerated. (Penal Law, Section 913.) Also once a child is beyond the compulsory attendance age of 16, only under special circumstances does a parent incur any further obligation to assure he attends upon some instruction. (Education Law, Sections 3206, and 3212.)

VIII. Summary and Conclusions

This concluding section is divided into three parts: (A) The Public Schools Generally; (B) New York City; and (C) Private Education.

A. The Public Schools

The state constitution and legislation place only broad substantive restraints and guidelines upon the state and local officials who control the curriculum in the public schools. In fact, the provisions in the state constitution touching upon the free exercise and establishment of religion, as interpreted in the past by New York courts do not impinge upon administrative discretion. Article 11, Section 1 may only provide in the future a basis for doctrines assuring pupils of a minimally adequate education. Legislatively adopted provisions are more significant insofar as they establish alternative minimum program requirements for different classifications of pupils. In this respect particularly the legislature has given the state the role of assuring that the educational needs of certain groups of pupils are attended to, such as the handicapped and non-English speaking. Taken together, these legislative provisions suggest an overall state policy of assuring children an education from which they may benefit. The substantive requirements imposed upon local districts by the Board of Regents and Commissioner, are somewhat more precise and operationalized as a result of the Regents' examinations and syllabuses; these requirements somewhat further constrain local district discretion. Other provisions like those affecting the administration of personnel policy also constrain but leave the local district substantially free to innovate and improvise. Districts largely may determine the content of the courses they must offer, may provide additional courses, may select the methods of instruction and adopt a program of instruction which is not neutral insofar as it is supportive of the United States, and the present President and his policies, or a prevailing local culture.

The most important participants in the formation of curriculum policy are the local school boards, who are assisted by a superintendent and other employees. These local boards, because of the at-large elections systems used in the state, are dominated by "majority factions" to the exclusion of influence of "minority functions." (James Madison,) Because elections at the local district level are staggered, however, it is possible that at different elections different majorities may influence the outcome of the elections: thus when one set of board seats is up for election at one time, the converging political forces may lead to the election of one kind of board member whereas a different convergence of forces leads to another kind of board member being elected at another time. Because the terms are staggered, it means different groups may obtain representation on the board at different elections with the result during that period that the terms of the different board members overlap; several groups may have representation simultaneously. But even under this system it has been difficult for even large minority groups to obtain representation on school boards.

These arrangements, particularly the emphasis upon local control and the legislature's emphasis upon classifying pupils for purposes of providing them different kinds of education, results in a compromise between a state-wide uniform education for all children and individualized instruction tailored to the interests and needs of each child. By creating broad classifications of pupils subject to differential treatment, a step toward individualized instruction has taken place. And by placing the basic control of the education of, for example, non-English speaking pupils, in the discretion of the local districts a further variety is made possible since non-English speaking pupils may be treated to a different program in different districts. All children of a given classification in a given district may be exposed to the same

curriculum, hence the variation between pupils is of two sorts: between types of children within a district and between school districts.

Assuring variety between school districts itself represents another kind of compromise between state-wide majoritarian control over education and letting each identifiable group control the education of its children. By organizing the control of education in terms of geographic units, some recognition is given to group interests in controlling educational policy to the extent district boundary lines coincide with location of identifiable groups. However, to the extent these boundary lines include within the area more than one identifiable group, to that extent control of policy is given to an overriding majority or a majority made up of minorities which have reached an understanding. (See Alexander Bickle, The Supreme Court and The Idea of Progress, p.)

At the same time, school boards are subject to several different kinds of devices to provide a check and constraints on this potential for variety. The Commissioner on his own motion may establish policies constraining and directing local district policy. Unions may attempt to press for concessions on curriculum policy, but, since curriculum policy is not a mandatory topic of negotiations, the board may refuse. Yet because the impact upon working conditions of a given curriculum policy is a mandatory topic of negotiations, unions do have an opportunity indirectly to affect curriculum policy. Parents, students, individual teachers, taxpayers, citizens and interest group organizations have no special rights to control school curriculum except through the political process. If those attempts fail, and a conflict exists between these groups and the school board, resort to the Commissioner and the courts is possible.

Although the Commissioner has it in his power to establish a broad definition of who has standing to appeal to him and to impose his own conception

of the proper policy upon the local district, he has generally refused to do either. His definition of who has standing to seek review limits review only to those who have been in fact directly affected by the local board's policy. And the standard of review adopted by the Commissioner is the same standard of review imposed by statutes upon the courts--a standard of review the courts have said is not binding upon the Commissioner.

The courts for their part have been constitutionally assured a minimum jurisdiction to review both the Commissioner and local districts. The legislature in attempting to rationalize and simplify the minimum jursidiction granted the courts, opened the door to a judicial determination that its jurisdiction has been expanded. The courts have taken the opportunity aggressively to assert jurisdiction both over the Commissioner and the local districts. As part of this general expansion of judicial power, the courts have been fairly liberal in granting standing to sue to a variety of possible litigants--parents, teachers, taxpayers and perhaps even students sueing without parental consent. But while the courts have been aggressive in seeking to expand their jurisdiction they have been more restrained in the exercise of their review powers. In particular the courts, as has the Commissioner, refrained from intervening on matters directly or indirectly involving school curriculum policy. Local districts have been given unfettered discretion to control their curriculum: they are not forced to work under sharply defined and harshly imposed judicially developed principles. The districts are left free to experiment.

Thus, the control of curriculum policy is today open to significant political influence in the broad sense of the term political. (Political considerations are probably an important part of the restraint exercised by the Board of Regents and Commissioner and perhaps even the courts whose judges are elected.) Since local boards are free of detailed legislative

constraints, detailed directions from the Board of Regents and Commissioner, and judicially forged principles, the way is open for majoritarian process to have their sway at the local district level. In the realm of curriculum policy at least, there seem to exist no anti-majoritarian devices to protect groups and individuals with policy views on curriculum which run counter to the view of the majority on the school board. Curriculum appears to be one of the few areas in which notions of individual rights have not led to the establishment judicially imposed principles or procedural mechanisms, or electoral devices designed to balance the interests of the majority and the minority.

But there is potential for significant change in the existing arrangements. First, in terms of the allocation of roles, the system could be more centralized if the Board of Regents and Commissioner more vigorously exercised their authority. At the same time, the system could be more decentralized if the local districts were willing to involve more parties in decision-making. Districts could negotiate curriculum policy with the unions. They could delegate more authority to parents and individual teachers and they could involve students in the formation of curriculum policy. All these possibilities exist within the existing legal framework without a change in any statute.

Changes could also be realized through a series of court suits seeking: to assure students of a minimally adequate education; to force the provision of such programs as bilingual education; to challenge the use of curriculum materials on motivational grounds; to assure students some modicum of procedural due process before being assigned to particular courses and programs; to produce greater parental involvement in the assignment of pupils to courses and programs on a theory based on the parent's rights to control his child's education; and to stop heavy handed indoctrination efforts; as well as to stop departures from observing neutrality in the presentation of current issues of public policy.

Whether such suits would be successful in New York depends upon several factors including a willingness by the courts to infer important values not now explicitly stated in either the New York constitution or the statutes of the state. But inferring such values is a traditional judicial function. Next, the courts would have to be willing to develop approaches to judicial review that rely less heavily upon determining if the local action was without rationality, i.e., whether the policy in fact contributed to the proposed end. The courts would have to examine the motivation of the districts in certain instances (John Hart Ely, op. cit.) and adopt a mode of review which asks whether the local policy sweeps too braodly, or unnecessarily impinges upon those important values inferred by the court from the State Constitution and legislation. If the local policy fails this test, it might be struck down as an abuse of discretion, an improper weighting of the contending values. Finally, the courts would have to be willing to examine more closely the factual basis upon which school policies are based. This might be done even under the "substantial evidence" standard as that standard for reviewing facts does not support judicial acquiescence in whatever an agency may do. Even the minimum quantum of judicial review suggested by the substantial evidence test does require the agency to come forward with some proof of the facts upon which it relied. A mere claim of educational expertise should not be sufficient to pass court muster. Finally, since many of the suits suggested above are based on a non-constitutional theory, courts would have to recognize the difference between their role when analyzing the constitutionality of a law versus the degree to which discretion has been abused. The constitution of the state and nation provide the minimum levels of protection which must be afforded certain values. A state is free to provide a greater degree of protection to those same values, and to the extent it can be inferred from state policies that

certain values, e.g., rights of parents to control their child's education, or neutrality in the presentation of current issues of public policy, have been given greater protection by the state, to that extent court review should be more vigorous. Judicial review in non-constitutional cases does not have to be as restrained as in constitutional cases.

B. New York City

The federated system of New York City represents one kind of innovation in governance that does attempt to take into account the problem of majority and minority interests. Three devices are embodied in the decentralization law which address the problem. First, the use of proportional representation is a step in the direction of trying to assure broad representation on the community boards. As was indicated because of a variety of political factors, the system has not always worked. But at least proportional representation opens the door to the board somewhat wider than do at-large elections. Secondly, the presumed active role of the city-wide chancellor and city-wide board in curriculum policy also provides a checking device on the local boards. Disgruntled parents can seek a review from the chancellor and board on curriculum matters and because of the statutorily imposed duties with regard to curriculum these officials cannot easily avoid their responsibility by simply saying the problem is one committed to local control. Finally, the decentralization law took one small step toward greater parental involvement in the decision-making processes of the community districts by requiring the community boards to establish certain parental groups to which the boards must report. Here again a door is open for even those parents who constitute a minority viewpoint to obtain access to school politics. None of these arrangements guarantees that any and all groups will achieve at least some of their curriculum policy goals, but they do improve the odds.

C. Private Education

The two central problems in state regulation of private educational effort is the question of standards and mechanisms of regulation. The dilemma the state faces is one of assuring that children are receiving an adequate education, defining what an adequate education is, and finding mechanisms for implementing the standard without at the same time trampling upon the rights of parents to control the education of their child or eliminating the opportunities for experimentation and flexibility that are among the most important advantages of private educational efforts. New York has struck the balance in a peculiar way. On the one hand, it has adopted a standard which, if fully implemented, could easily trample upon parental rights and stamp out experimentation and diversity. The standard--that private education must be substantially equivalent to the educational efforts made in the local public school district in which the child lives--permits diversity only to the extent public school programs differ from place to place. But since public school programs are in substantial respects alike, imposition of the standard would lead to a similar sameness in private education efforts. At the same time, by forcing parents to provide an education substantially equivalent to that in the nearby public schools drastically restricts the freedom of the parent to control his child's education. What saves the system from realizing such a result is the mechanism of enforcement, namely, voluntary registration with the state department and supervision of private educational efforts by the local public school system. Since the public school systems are neither well equipped nor inclined strictly to enforce the standard, private schools are importantly left free of constraint.

State regulation of private efforts has not worked out quite so happily for the parent under the neglect laws. As discussed above the neglect laws

are so vague that they permit drastically different sets of standards to be applied by family court judges. The result is both a potential for a severe imposition of alien values upon a parent by a hard-nosed judge and for all principles of formal justice to be violated as like cases get drastically different treatment from court to court.

Internal family disputes over the education of the child go largely unsupervised by the courts or the state legislature unless the problem becomes so severe as to amount to a problem of neglect.

Finally, it might be noted that this review of New York curriculum law has revealed several possible ways in which parents might seek through courts suits state funds for the support of their children in private schools. Emerging notions of a right to a "free" education based on Article II, Section 1 provide one means of attack, as well as do equal protection arguments. These suits also provide an indirect method for calling into question the adequacy of the existing public school programs.

CHAPTER FIVE

STATE OF MASSACHUSETTS CURRICULUM LAW

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FOOTNOTES

I. Constitution*

Our discussion of how the Massachusetts Constitution bears on curriculum is relatively short. There have been no right-to-education decisions drawing on the Massachusetts Constitution as a source of authority. In addition, because Massachusetts courts have narrowly construed both state and federal constitutional guarantees of individual rights in the public school context, Massachusetts litigants have increasingly turned to federal forums, where, obviously, their presentment of claims emphasize federally created rights.

For example, the First Circuit Court of Appeals held, in Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970), that the expulsion of a student for violating a school grooming regulation was an unlawful deprivation of liberty; the court rejected the opposite conclusion reached by the Supreme Judicial Court five years earlier in Leonard v. School Committee of Attleboro, (349 Mass. 704, 212 N.E. 2d 468 (1965), a case with substantially the same facts.)[1] There is a long line of cases in which the Supreme Judicial Court has upheld the expulsion and suspension of school children. That pattern of decision can be seen as a paring down of the dimensions of any state-created right to education, or as a statement that enforcement of conventional values is an appropriate part of the educational process. However, we think it can best be understood as the applications of the Court's long-standing rule of non-interference (absent the most egregious violations of law) in the "discretionary" decisions of local school officials. Consequently, our

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*In Massachusetts, the highest state court is the Supreme Judicial Court; the legislature is the General Court.

review of these cases is reserved for Section 5, dealing with the authority of local districts.

The remaining topic in state constitutional law, as it affects school curriculum, is authority allocation. The constitution imposes on the legislature the duty to maintain public schools.[2] By its failure to mention any substantive guidelines, or to create any coordinate institutions for supervising public education, the document vests plenary authority in the legislature to shape the public school curriculum. The legislature has, in turn, delegated most of its curriculum policy-making power to school committees. It has created a statewide education agency, but one with little control over instruction. Unlike the situation in states with constitutionally established state education agencies, or with constitutionally prescribed patterns for textbook selection or other forms of curriculum control, in Massachusetts the legislature theoretically could go to extremes. It could abolish, or it could greatly increase, the authority of either local school committees or state education agencies.

While the original constitutional allocation of authority to the legislature is relatively straightforward, the lawfulness of delegations of that authority by the legislature, and of subsequent sub-delegations by its delegatees, can involve difficult legal questions. The issues have state constitutional stature, because a major source of delegation doctrine is the Massachusetts Constitution, Part I, Article 30, which declares the separation of governmental powers in the judiciary, executive, and the legislature, and which forbids any department from exercising the powers of the other. Also important is the general grant of law-making authority to the legislature which is embodied in Part II, Chapter 2,

Section 2, Article 4. This grant impliedly prohibits some kinds of delegations of the granted powers. For example, it has been held that the General Court can not delegate to anyone its powers of appropriation.

> "'[The] Legislature cannot delegate its law-making power or any power explicitly reposed in it' Attorney General v. Brissenden, 271 Mass. 172, 180, 171 N.E. 82." In re Opinion of the Justices, 302 Mass. 605, 19 N.E. 2d 807 (1939).

Of course, there are exceptions to this broad anti-delegation rule -- otherwise executive and administrative agencies could not effectively carry out legislative policies. Thus, it is said that the legislature can delegate to an officer the working out of the "details" of a defined policy. Opinion of the Justices, 328 Mass. 674, 105 N.E. 2d (1953). And cities and towns may make regulations pertaining to a limited class of matters of "purely local interest."

The adoption by Massachusetts of constitutional home rule complicates the status of municipalities as delegatees of legislative power.[3] A delegation doctrine attack on a statutory grant to a municipality can be blunted either by showing that the Home Rule Amendment itself constituted a grant of the powers in question, or showing that the amendment authorized the legislature to delegate powers of the kind in question to the municipality. The relevance of this home rule arrangement to authority over curriculum is the absence of any analogous situation in regard to public schools. That is, there is no constitutional provision for school committee "home rule" nor any grant of constitutional authority to state education agencies. Consequently, delegation attacks on legislative grants to education agencies must be met head-on. Also, a delegation such as from a school committee to an experimentally created

school governing board, is clearly a sub-delegation. By comparison, if a municipality vested some of its constitutionally derived authority in -- say -- a community corporation, that would be an original delegation. (Of course if the municipality vested statutorily derived powers in that corporation, there would be a sub-delegation, analogous to the situation with the school committee.)

The issue that mainly concerns us in this area, is the lawfulness of delegating the authority to control curriculum to private persons. For example, what curriculum decisions can be ceded to teachers under the terms of collective bargaining agreements? Or to the parent-teacher governing boards of public alternative schools?[4] These questions can be brought to an unusually sharp legal focus in Massachusetts because of a statutory and a state constitutional provision. First, M.G.L.A. c. 71, sec. 13 provides:*

> "In every public high school having not less than one hundred and fifty pupils, any course not included in the regular curriculum shall be taught if the parents or guardians of not less than twenty pupils request in writing the teaching thereof, and if there is an enrollment of not less than twenty pupils . . . "

Is this a lawful delegation of curriculum control to parents? The answer depends, of course, on how this brief and vague provision would be interpreted by the courts. A standardless duty to offer "any" course is suspect.

Second, Amendment 46, sec. 2, of the Massachusetts Constitution prohibits public financial aid to any institution of learning,

> "which is not publicly owned and under the exclusive control, order, and superintendence of public officers or public agents. . . ."

This restriction presents a delegation problem in other guise. For example, take the question of the legality of an arrangement whereby a

* This statute was amended in June 1975, to provide for student-initiated courses. See infra, at 104.

school committee funds a public alternative school having a parent-teacher governing board. The school committee delegates to the board the authority to veto the hiring decisions of the principal, and to establish guidelines for the course of study in the school (provided the guidelines are not inconsistent with basic school committee policies). One would probably begin a delegation analysis with the premise that the board is a "private" group, and then focus one's scrutiny on the nature of the powers exercised, the scope of discretion, and the specific characteristics of the group, before finally deciding whether the board could lawfully exercise the above-named powers.

Faced with a challenge based on the Eighteenth Amendment, however, one would proceed differently. Since the applicability of the prohibition depends on whether the board is "private," one would want to reserve decision on whether to classify the board a "private" entity, pending a close examination of the nature of the powers it exercises in the operation of the school. Under the language of the amendment, finding the board to be "private" is not a premise but a conclusion.

However, even finding that the board was "private" would not dictate the ultimate conclusion that funding the school violated the constitution. One could argue that participation by this admittedly private body in governing the school did not erode the school committee's position as the exerciser of "exclusive control" over the alternative school.

Whether one applies delegation doctrine or the restriction of the amendment, the underlying issues are the same. The applicable legal principles, to the extent they have been developed, are to be found in the delegation cases. Let us turn, then, to an examination of those cases and doctrines. The framework that was developed in the examination of Arizona delegation law is also useful for marshelling the Massachusetts

decisions. This is not to say that the substantive law of the two states is the same -- in fact, there are marked differences. For example, the Supreme Judicial Court has ruled unconstitutional on delegation grounds provisions of fair trade laws similar to ones that the Arizona Supreme Court has upheld.

A. The Nature of the Power

The closest the Supreme Judicial Court has come to drawing a bright line between delegable and non-delegable powers has been to say that the police powers of the commonwealth cannot be delegated to private persons. For example, the Court rendered an advisory opinion on the constitutionality of a bill authorizing cities and towns to make certain contracts with private corporations. Under these agreements, the corporations would agree to undertake specified land redevelopment projects. In return, the municipalities agreed to excuse the redeveloped sites from the application of ordinances or regulations enacted subsequent to the agreement; also the bill would exempt said properties from the effect of subsequently enacted statutes. At the outset, the Court noted the difficulty of distinguishing between "general" governmental powers, and certain "core" police powers which could never be delegated.

> "It is hard to draw precisely the line of demarcation between (a) those contracts binding upon the Commonwealth which preclude future legislative change impairing their obligation without the payment of compensation, and (b) contracts which invalidly purport to bind the Commonwealth not to exercise its police power. The opinions already cited give general indication of where the dividing line lies." 168 N.E. 2d at 873.

So far as the bill in question was concerned, the Court concluded that the "core" powers with respect to which the state and municipalities

could not be bound, included health and safety regulation, changes in governmental structure that involve regulation of the project, and other

> "legislative regulation within the strict or 'narrower signification' of the police power . . . "
> 168 N.E. 2d at 874

On the other hand, the Court said taxation was one example of those powers which could be subjected to prospective limitations, if the restraint was for a reasonable time. Thus, an agreement not to raise the property tax rate on the project site for five years would probably satisfy delegation criteria.

The scarcity of delegation cases makes it difficult to cite concrete examples. The Supreme Judicial Court advised against a bill that would have provided that upon the petition of 70% of the barbers in a locality, the board of health could set particular days and hours for doing business. The delegation question presented by this case was a very narrow one, however. The Court had previously held, on substantive due process grounds, that the state (through the board of health, acting on its own initiative) could not regulate barbers' hours. Thus, the precise holding was that the state could not cure its lack of constitutional authority to regulate barbers by an arrangement which gave barbers an opportunity to participate in the regulation.

The Court was particularly concerned with the institutional unaccountability of the barbers to the general public, and the danger that the majority of barbers would use state power to gain economic advantage over the minority.

> "There is no discernible connection with public health or safety in a provision which makes a trade agreement a condition precedent to board action. The result would be economic tyranny." Opinion of the Justices, 337 Mass. 796, 151 N.E. 2d 631, 633 (1958).

Another case involving economic rights is Corning Glass Works v. Ann & Hope, Inc. of Danvers, 73 A.S. 575, 294 N.E. 2d 354 (1973). The Court struck down the non-signer provision of Massachusetts' fair trade law. The defendant bought Corning products in Rhode Island, without signing any price agreement, and sold the goods in Massachusetts at prices below the "fair trading price" stated in the agreement between his seller and Corning. Under the statutory provision, the non-signer defendant was bound to the minimum sales price stated in the agreement.

The Court grounded its holding on the theory that to put the courts at the disposal of Corning for the purpose of enjoining the defendant from selling goods at certain prices would amount to an unconstitutional delegation to Corning of legislative power because:

1) There was no participation by any public board or officer in Corning's price-setting,

2) There was no stated policy or standard to control Corning's decision-making,

3) There was no provision for notice, hearing, or judicial review of the price-fixing.

In other words, Corning could not be permitted to make decisions binding on a retailer and on the general public when it was accountable to neither.[5]

A partial delegation of zoning powers was upheld in Trumper v. Quincy, 358 Mass. 311, 264 N.E. 2d 689 (1970). An ordinance providing that whenever 20% of the landowners directly affected by a proposed zoning change petitioned the city council in protest, the council had to muster a 75% majority to enact the change. The arrangement gave a limited veto power to a 20% minority of affected landowners; and, of course, the petitioners might constitute an even smaller minority of all of the electors in the city.

B. Scope of Discretion

The Trumper case, discussed above, shows the Supreme Judicial Court relying on what we called, in our Arizona chapter, the "advisory role" theory. That is, the Court stated that the voting scheme for changing zoning ordinances was really no delegation at all. The governing body still had complete authority to change an ordinance; the arrangement was merely a special method for giving weight to certain kinds of grievances.

> "[T]he Legislature has rightly exercised its discretion in predetermining the precise degree of extra diligence those citizens will be guaranteed." 264 N.E.2d at 690.

In Corning, the Court mentioned two other theories that involved the scope of discretion. It pointed out that there were no standards for Corning's price-setting, and it noted that there were no procedural safeguards in the process.

Though the advisory opinion regarding regulation of barbers' hours was less explicit, there too one can find concern about lack of standards and lack of procedural safeguards. The Court never reached the question whether reserving the final regulatory decision for the board of health, a public body, would prevent the vesting of overly broad discretion in private persons, since it had already held that the board itself lacked constitutional authority to carry out this kind of regulation.

Finally, in its advisory opinion on the land redevelopment bill, the Court formulated standards governing that delegation. It limited both in terms of kind and duration, the sort of authority which could be delegated through public land development contracts.

C. Nature of the Delegatee

The Supreme Judicial Court's most unequivocal rejections of delegation schemes involved delegatees with very obvious economic self-interests --

the barbers and the Corning manufacturing company. On the other side of the ledger, the court sustained the zoning ordinance in Trumper, where a plenary governmental body was deeply involved in the final decision-making, even though persons probably motivated by strong private interests (landowners) were given a privileged role in the decision-making process.

The intermediate case is the advisory opinion on land redevelopment contracts. The proposed bill was based on the premise that the energies of persons working for their private profit could be channeled into creating public benefits that government alone could not easily achieve. The Court did not challenge this premise, but did state some guidelines designed to prevent private interests from acquiring powers unnecessary for the accomplishment of the bill's constitutional purposes.

Finally, we should note an opinion in which the Court focused on accountability problems. It had been proposed that the legislature authorize a private historical society to "expend [public money] for clerical and other assistance" in connection with the official commemoration of historical events. Opinion of the Justices, 337 Mass. 777, 150 N.E. 2d 693 (1958). The Court emphasized two factors:

a) The named group was a voluntary, unofficial group. Its election and membership was not governed by any state laws.

b) The group was not ACCOUNTABLE to any department of government. Yet it would be accorded authority to spend money for an activity which is supposed to be of general benefit to the public.

D. Delegation — Conclusion

As we have found in other states, delegation doctrine cannot be summed up in concise statements of rules. Rather, the Supreme Judicial

Court has weighed several variables in deciding each case. Unlike some courts, however, the SJC has not pretended that it is merely applying clearly applicable verbal formulas. Rather, depending on the circumstances of any particular case, the Court's reasoning has shown traces of a variety of theories which take into account a) the kind of power exercised, b) the scope of discretion (advisory role; standards; procedural safeguards), and c) the nature of the delegatee.

In addition to noting the Court's tendency to carefully tailor its analysis to the issues presented in each case, we can fairly make two other generalizations. First, the Court is especially suspicious of authority delegations to persons with clearly self-interested economic motives. Second, the Court demands a showing of political accountability by the delegatee. Again, the Court will accept various forms of accountability -- via standards, administrative safeguards, political safeguards -- but there is a threshold that must be satisfied. It is hard to define the threshold, but it appears to demand a relatively close coincidence between the scope of the interests affected by the delegated powers, and the identity of the persons participating in the exercise of those powers. Also, Trumper shows the Court's willingness to permit weighted participation, so long as the general standards for accountability and fairness are satisfied.

We think that the Massachusetts statute* which requires that a high school provide any course which is requested by twenty petitioning parents is an unconstitutional delegation of authority to private persons, if it is given a literal interpretation. To take an extreme example, a rash of parent-initiated courses could put such demands on local resources as to prevent the school committee from carrying out plans and policies

* M.G.L.A. c. 71, sec. 13. This law was amended in June 1975, to provide for student initiated courses, by vote of 5% of the student body. See Section II, infra, at 26; Section V, infra, at 104

which they had formulated on behalf of the majority of the electors in the city. Also, one can imagine this statute being used to implement a minority perspective on a subject already being taught. For example, the statute does not address the problem of resolving a dispute between parents who have petitioned for a course in energy conservation, and a principal who maintains that the subject is already "adequately" covered in an existing science course.

The statute could, however, be brought into conformity with delegation doctrine. The privileged position given parents as opposed to other school electors is not unconstitutional, per se, given the approval of the voting scheme in Trumper. It would only be necessary to clarify that the curriculum petition procedure could not be used to defeat basic curriculum policies which had been formulated within accountable institutional arrangements.

Similarly, the alternative school governing board arrangement could easily be brought into conformity with delegation doctrine. The various solutions might entail setting of standards by the school committee, creation of procedural safeguards, reliance on the advisory role theory (i.e. that the board is in an advisory position vis-a-vis the school committee). Moreover, conformity with the Eighteenth Amendment could be based on either of these theories: a) that the procedural safeguards and institutional arrangements turned the board into a "public" entity for the purposes of the amendment; or b) that the board was a "private" entity, but its authority was so circumscribed that the school committee could still be said to be in "exclusive control" of the school.

Probably the most difficult area for applying delegation doctrine is in the area of collectively bargained contracts which have terms

relating to curriculum. To a great extent, we have a problem of delegation to persons with private interests in salary and in working conditions. On the other hand, school officials may believe that delegation of some kinds of authority to teachers may improve the quality of instruction. This problem of the simultaneous convergence and divergence of public and private interests was also presented in the advisory opinion on land redevelopment the facts were very different. However, on the basis of the analysis in that case, one would expect the Court, if confronted with a teacher union contract case, to examine the terms of the contract to determine which ones involved "core" policy matters, and which involved more peripheral governmental responsibilities which might, for suitable purposes, be shared with private persons under a contractual agreement for a limited period of time.

II. Legislature

A. Introduction and Summary

The Massachusetts Constitution gives no details about the structure and management of the public schools, leaving design decisions to the legislature. What the legislature has done with its discretionary authority must be viewed not only functionally but also historically. As will be more fully set forth in our section on district authority, the local school committees long enjoyed an all but sanctified status, which meant that curriculum control was almost entirely in their hands. This situation began to change in 1965, a year that saw the issuance of the Willis-Harrington Report, the reorganization of the state education agencies, and the passage of the Racial Imbalance Act.

The Willis-Harrington Report exposed serious failures and many embarrassing anachronisms in public school instruction. The legislature responded by re-organizing the state education agencies and giving them new powers. In the decade since the report, several laws have been passed mandating particular instructional services, and establishing complex authority relationships among state agencies, school committees, parents, teachers, and other actors. School committee autonomy over curriculum and other school affairs has been modified.

The new authority pattern is both more centralized and more decentralized. On the one hand, the state board of education has been authorized to formulate and enforce general standards for curriculum, and specific ones for special education and bilingual education; it has been given explicit power to require reporting of information by school committees; it can cut off state funding to districts in non-compliance with state law and board regulations; it can establish a

limited number of experimental school systems independent of the school committees which would otherwise have territorial jurisdiction over them.

On the other hand, the legislature has created a student seat on the Board; it has established or permitted the Board to establish citizen advisory committees to participate in the policy formation process for several curriculum related areas; it has given teachers a role in developing and applying criteria for teacher certification; it has given parents and students the right to initiate courses in the high schools; it has created procedures through which parents can challenge educational placements of their children. The common denominator of these changes is the erosion of school committee dominance. Local decisions that were once immune to challenge by state officials or by parents, students, and teachers, are now being shared with these parties.

Notwithstanding these changes, Massachusetts still is the most "decentralized" state in our study. There is no state textbook selection; no state agency with general authority to review local decisions; no state-prescribed course of study beyond a few typical statutory provisions requiring instruction in history, civics, health, and the like. But the complexities introduced by the legislation of the last decade demonstrate the inaptness of relying on the unqualified term, "decentralized." The degree of curriculum centralization can depend on what program or what child you are talking about. A child who has learning difficulties or who is a non-English speaker is entitled to have educational services conforming to state regulations provided for him by the local district. A high school student in a parent-initiated course partakes of a mixture of state centralization, and radical decentralization -- by state law, ad hoc groups of parents were given the

right to displace some of the school committee's authority to decide what courses to offer. But the methods used in the normal classroom, the textbooks that the student brings home from school, are determined by the school committee without state intervention. No state officer, for example, could prevent a Massachusetts school committee from purchasing the social science curriculum, Man: A Course of Study.

B. Institutional Framework

Under the Education Code, each municipality must maintain public schools. The schools in each town are governed by elected school committees. The committees have general control over the curriculum, and they enjoy fiscal autonomy. The municipality must appropriate monies sufficient to cover all "necessary" expenses in the budget submitted by the committee. The courts have held that it is almost entirely a matter of committee discretion to decide what items are "necessary." Election procedures and organization of school committees is ordinarily provided for in municipal charters.

At the state level, the chief educational policy-making body for elementary and secondary education is the Massachusetts Board of Education.* It consists of,

> "the chairman of the student advisory council [an elected representative of Massachusetts high school students] established under this section, the chancellor of the board of higher education and the director of research of the advisory council on education, ex officiis, and eleven other members, residents of the commonwealth, to be appointed by the governor, one of whom shall be a member of a labor organization affiliated with the State Labor Council AFL-CIO and at least two of whom shall be women. [The chancellor and director of research have no votes.]" M.G.L.A. c. 15, §1E.

*State law also establishes the post of Secretary of Education who is a member of the governor's cabinet. The Secretary has no strong statutory powers for controlling the Board of Education. M.G.L.A. C. VIA Sec. 1,2,14.

The administrative arm of the Board is the Department of Education, and the Board appoints a Commissioner of Education to be its chief executive officer. The Board appoints the Commissioner by a two-thirds vote, and thereafter may remove him by a majority vote. These agencies are insulated from direct electoral pressure (with the possible exception of the student member, who could conceivably be removed from his post by his constituents). The governor appoints the other voting members, without any procedure for legislative approval. The only limitations on the governor are the statutory requirements that he pick at least two women and an appropriate labor representative. There are no standards regarding the professional or lay status of appointees. Then, of course, the Commissioner is appointed by these appointees. Anticipating our findings about the narrow scope of authority of these officials -- as compared to their counterparts in other states -- it can be said that this institutional arrangement supports the generalization that state education agencies with the least authority over curriculum are also likely to be least subject to direct political control through electoral processes.

The Massachusetts Advisory Council on Education (MACE), whose director of research is a non-voting member of the Board, was created in the 1965 reorganization. A nine-member body, its function is to support research and study into problems in public education in the state. MACE has already sponsored several thorough and provocative reports. The Willis-Harrington Report exposed not only many problems in Massachusetts public schools, but also a shocking degree of ignorance about the existence of these problems. MACE is one of the features of the reorganization which points to a legislative definition of a major

role for the state agencies in ferreting out information about the schools, analyzing it, and making recommendations. For example, the board was newly authorized to,

> "collect and maintain information from any public school system in the commonwealth relevant to its work or requested of it by the advisory council on education." [emphasis added] M.G.L.A. c. 15, §1G.

C. Statutorily Mandated Instruction

The legislature's general curriculum mandate appears in M.G.L.A. c. 71, §1:

> "Every town shall maintain, for at least the number of days required by the board of education . . . a sufficient number of schools for the instruction of all children who may legally attend a public school therein. . . . Such schools shall be taught by teachers of competent ability and good morals, and shall give instruction and training in orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, music, the history and constitution of the United States, the duties of citizenship, physiology and hygiene, physical education, and good behavior." [emphasis added]

This list is amplified by other statutory provisions. The intended content of civics instruction is described a little more fully in c. 71, §2.

> "In all public elementary and high schools American history and civics, including the constitution of the United States, the declaration of independence and the bill of rights, and in . . . high schools the constitution of the commonwealth and local history and government, shall be taught as required subjects for the purpose of promoting civic service and a greater knowledge thereof, and of fitting the pupils, morally and intellectually, for the duties of citizenship."

The theme of moral education is picked up in c. 71, §30, which provides, in part:

> "[I]nstructors of youth shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues upon which a republican construction is founded . . . "

This section is more like an inspirational speech than a course syllabus. And there is something in it for everyone. For example, in a dispute about a teacher presenting materials critical of United States foreign policy, the teacher might say he was imbuing "a sacred regard for truth," by presenting unpopular opinions or unpleasant facts, while the critic might complain about the failure to imbue "love of country."

Military drill and gymnastics are required in c. 71, §3, with a religious exemption allowed from the drill. Pursuant to c. 71, §1A, each classroom day is to begin with a period of "silent meditation." The Attorney General has found that a complementary provision for "voluntary prayer" (c. 71, §1B) is unconstitutional.

Requiring school committees to offer these subjects in no way detracts from local authority to offer instruction in other subjects. In other words, Massachusetts is one of those states with a <u>permissive presumption</u> in favor of the local control of curriculum. After the above-quoted enumeration of subjects in c. 71, §1, that section continues:

> "Such other subjects as the school committee considers expedient may be taught in the public schools."

For high schools, there is a similar grant of discretion to offer courses considered "expedient," in section 4.

> "Every town [of specified size, unless exempted by the board] shall . . . maintain a high school, adequately equipped, which shall be kept by a principal and such assistants as may be needed, of competent ability and good morals, who shall give instruction <u>in such subjects as the school committee considers expedient</u>." [emphasis added]

In Massachusetts, this legislative intent to permit the school committees to go beyond the legislatively prescribed subjects and offer other courses at their discretion, is unusually clear. First, the grant of authority is contradicted neither by laws giving state officials authority to prescribe additional courses (which could result in the pre-emption of local discretion by the state prescription of a total curriculum) nor by provisions impliedly giving state officials power to prohibit certain kinds of instruction. Second, local curriculum authority is not put in doubt by a set of specific statutory permissions for local course offerings which by their very nature imply that relevant subjects could not have otherwise been offered.

At first glance, c. 71, §13D, Driver Education, might seem at odds with this point.

> "Motor vehicle driving education may be incorporated as a phase of the safety education program in high schools of the commonwealth."

It authorizes the high schools to give a subject that one would assume they already had the power to offer by virtue of §4. However, when this statute was enacted, in 1948, it was probably far from obvious to most school committees that the pre-automobile age legislature which spoke of "expedient" courses, would have considered this one of them. Undoubtedly, there are also questions about the status of equipment purchases as a "necessary" expenditure in the school committee budget. In 1954, the legislature decided to standardize driver training -- a logical step, given statewide regulation of automobiles and driving. Also, questions about charging of tuition for night courses were laid to rest:

> "The content of driver education courses shall be established by the commissioner of education in collaboration with the registrar of motor vehicles.

[Evening courses may be given.] School committees may fix reasonable fees for tuition in such evening courses or may provide that no fee shall be charged."

The important new development in the area of direct legislative control of curriculum is the passage of the Special Education Act[1] and the Transitional Bi-lingual Education Act.[2] These laws in no way controvert the general premise of permissive local control of curriculum. Rather, they are examples of legislative action to pre-empt some aspects of curriculum in areas of particular state-wide concern. Each of these statutes imposes a duty on the local school committee to provide certain services. Of course, we have already seen how the legislature had mandated subjects previously. But these new laws are distinguishable.

What is strikingly different about the post-1965 curriculum laws is that they not only require a certain kind of instruction to be given -- they specifically give the state education agency the power and duty to regulate the content of the instruction. Moreover, compliance efforts forced many localities to restructure their instructional programs and to reallocate resources. Exceptional children had to be given instruction appropriate to their needs, but also had to be separated from normal classroom activities as little as possible. Children who spoke Spanish, and little or no English, had to be given programs in transitional bi-lingual education, defined as:

"a full-time program of instruction (1) in all those courses or subjects which a child is required by law to receive and which are required by the child's school committee which shall be given in the native language of the children of limited English-speaking ability who are enrolled in the program and also in English, (2) in the reading and writing of the native language of the children of limited English-speaking ability who are enrolled in the program and in the oral comprehension, speaking, reading and writing of English, and (3) in the history and culture of the country, territory or geographic area which is the native land of the parents of children of limited

> English-speaking ability who are enrolled in the program and in the history and culture of the United States." M.G.L.A. c. 71A, §1.

Also, in both the Bilingual Act and the Special Education Act, there are extensive due process procedures created for the benefit of parents who believe their children have been improperly placed in, or placed out, of one of the special programs. Although it can be said that these laws are exceptional acts of state pre-emption which do not alter the basic premise of basic local control of curriculum, it is also true, as a practical matter, that a few more pre-emptions of this dimension would cut down much local discretion.

There is little indication, however, of a trend towards further reallocation of curriculum authority to state agencies. In fact, although the 1965 reorganization included a provision which could have been the basis of an enlarged state role, the clause has never been implemented, and apparently has been forgotten by both state officials and legislators. It reads:

> "The board shall establish minimum educational standards for all courses which public schools require their students to take."
> M.G.L.A. c. 15, 71G

The story of the failure to enact any regulations under this provision is told in Section III.

The degree of legislative control of the details of curriculum in Massachusetts appears to vary depending on the student population that is involved. The Transitional Bi-lingual Education Act, the Special Education Act, and the Racial Imbalance Act of 1965 (mentioned here for the first time) demonstrate the willingness of the legislature to forcefully intervene in local school affairs on behalf of students who cannot be expected to be represented adequately in the local majoritarian

process of school committee politics. The education of the "normal" child, who is not an obvious victim of benign neglect or intentional discrimination, is still predominantly in the school committee's hands. Although the legislature has shown its interest in mainstream educational reform by its passage of several laws furthering experimentation and innovation[3] it has not favored direct intervention. Rather, it has tried to improve the quality of local debate by gathering, analyzing and publicizing information. Basically, the Board is an adjunct to the local curriculum determining process. With its specialized research tools it can develop information with which parents and school officials can evaluate local instructional approaches, and can consider alternatives that have been tried elsewhere.

D. Miscellaneous Authority Allocations

By several relatively minor enactments, the legislature has widened beyond usual range in other states, the scope of persons who can participate in curriculum decision-making.

We already noted that a high school student sits on the Board of Education. Behind that representative is a regional council of student advisory committees, and each high school has its own advisory committee. M.G.L.A. c. 71, §38M provides:

> "School committees of cities, towns and regional school districts shall meet at least once every other month, during the months school is in session, with a student advisory committee to consist of five members to be composed of students elected by the student body of the high school or high schools in each city, town, or regional school district."

Parents have a right to an unusual form of participation in shaping high school curriculum to suit their particular child's interests,

through M.G.L.A. c. 71, §13,* which provides:

> "In every public high school having not less than one hundred and fifty pupils, any course not included in the regular curriculum shall be taught if the parents or guardians of not less than twenty pupils request in writing the teaching thereof and if there is an enrollment of not less than twenty pupils, provided said request is made and said enrollemnt is completed before the preceding August first and provided a qualified teacher is available to teach said course. The teaching of any course as provided by this section may be discontinued if enrollment of pupils falls below ten." [emphasis added]

This statute is fraught with ambiguity, and gives little indication of how parent-school official disputes arising under it should be resolved. The legislature surely doesn't mean absolutely "any" course can be initiated this way. By "any course", we presume the legislature meant any course that the school committee itself would have had authority to offer. The more difficult phrase is, "not included in the regular curriculum." If the school committee says that the subject matter of the requested course is already covered in a given course, does that end the petition? Or is the presumption in favor of the parental "finding" that the subject is not already covered?

Or to take another problem, when is a teacher "unavailable"? If a qualified person is on the high school faculty but assigned by the principal to teach other courses, is he "unavailable"? If there is no qualified teacher on the staff of the particular school, must the principal make some effort to find an appropriate instructor elsewhere in the system, or must he advertise the position? What if the parents have found someone not on the faculty who is clearly qualified to teach that course, but the person does not have teaching credentials -- could this statute be construed to be independent authority to hire the person, notwithstanding the credential requirements in other statutes?

* This statute was amended in June 1975, to provide for student-initiated courses. See infra, at 104.

The statute is obviously intended to give parents authority under some circumstances to substitute their judgement for that of school officials about their child's curriculum. In fact, the legislature amended the provision in 1973, closing a loophole which could have been used by officials to discourage enrollment in §13 courses by failing to accredit them. The amendment added the following sentence:

> "Such courses as may be taught under this section shall be given the same academic credit necessary for a high school diploma as is given to similar courses taught in said public high school, provided that the school committee shall make a determination as to the credit equivalency of such course prior to its being offered." [emphasis added] St. 1973, c. 111.

By the same token, it would be hard to believe that the legislature gave groups of parents the power to ride roughshod over good faith, non-discriminatory efforts by school officials to marshall their resources to satisfy the needs of the school population as a whole. Should expensive books and equipment be purchased for a course that may only be given once? How much staff time can be spared to develop new courses from scratch? One can hypothesize a situation in which the parents of high achieving middle class children petition for an exotic new course, when school officials think that the manpower needed to develop it would be better spent at remediating severe basic educational problems of other, low-achieving students. A mechanical application of the statute would take this decision outside of the broad-based policy-making process of the school committee. One can imagine a battle of §13 petitions arising in a factionalized educational community.

The history of this statute gives support to a narrowing of the scope of its intended delegation of curriculum authority. Between 1935 and 1949, several laws were enacted in almost exactly the same form, except that instead of applying to "any course," these specifically involved

foreign languages -- Italian,[4] Polish,[5] Lithuanian,[6] and "any modern language."[7] These provisions all were repealed when the present statute was enacted in 1972. This evolution supports the argument that the right conferred is one to petition only for a course which is clearly and conventionally defined. That is, the petition procedure may not be used as a vehicle for challenging, say, the school committee's decision about the appropriate content of a physics or social studies course.

This discussion of the statute has been confined to understanding legislative intent. One should note, however, that this provision also poses a problem of possibly unlawful delegation of authority to a private group. See Section I, infra at 11.

The last of the legislature's relatively novel participatory mechanisms is its creation of issue-oriented citizen advisory boards, and its authorization of the Board to use the advisory board structure at its discretion. For example,

> "The board shall appoint advisory committees in the areas of vocational education and special education, and may appoint advisory committees for each of its divisions and for each other curriculum area. The board shall appoint an advisory board for the training of deaf children in the public schools . . . " M.G.L.A. c. 15, sec. 16.

One sees a similar emphasis on citizen partication through special, rather than general institutional frameworks, in the legislature's structuring of the Office of Children, which it created in 1972. (M.G.L.A. c. 28A; St. 1972, c. 785). The Office is designed to be a child advocacy arm of the state, and to be informed of and responsive to the needs of its constituents. As stated in the statute, one of its goals is,

> "to assure parents a decisive role in the planning, operation, and evaluation of programs which aid families in the care of children." c. 28A, §1(2)

The Office is not directly involved with the management of public schools, but it does deal with day care centers, foster care, placement agencies, and practically every other kind of service for children. The citizen participation goal is meant to be achieved via numerous local councils, and a statewide advisory council.

III. State Agencies

A recent report by the Massachusetts advisory Council on Education (MACE) stated:

> "Massachusetts communities will not accept a state controlled school system except under duress, and will resist moves seen as being in that direction. . . "[1]

This prediction proved true during the implementation of the Special Education Act during 1973-1975, when one of the most frequently raised criticisms of the Act was that it was an unprecedented intrusion in local affairs. Being ordered to provide specific courses in conformity with state regulations -- largely at local expense -- cut against the grain. State aid was supposed to take the sting out of the financial demands of the act, but when the legislature failed to appropriate the amount of money the act's proponents had said would be provided, state "take-over" appeared even more imminent and insidious.

Similarly, when the Governor and the Board announced plans for a statewide educational assessment project, the idea was strongly criticized by persons who anticipated its use as a tool for establishing instructional priorities at the Board rather than in local communities. Foremost among the critics were teacher groups.[2] Undoubtedly, they feared that assessment would become a method for credentialing or setting the salaries of teachers based on tested student performance.

A general state take-over shows no signs of materializing. The Board's legal powers to intervene in local programs has stayed limited to specific areas in which the legislature has found emergency situations which were not likely to be cured by voluntary local action -- e.g. the plight of exceptional children who were without services and of normal

children who had wrongly been labeled exceptional and removed from normal programs; the plight of non-English speaking students; the plight of non-whites in racially imbalanced schools. When it comes to the bulk of curriculum, however, the Board's influence must be exercised through persuasion and financial inducements.

The basic pattern of authority in Massachusetts is decentralization, with the school committee as the key unit for policy-making. The committees have a permissive presumption working in their favor in so far as doubts about their statutory power to make curriculum policy is concerned. State agency powers, on the other hand, are enumerated, not residual. There is a restrictive presumption as regards purported state agency authority.

In this section we will briefly describe the organization of state education agencies, and then examine the six major functions of the role of these agencies. As we see them, these purposes and functions are: a) information gathering and planning (herein, of the assessment program); b) providing support for school committees and liaisons between localities and federal government; c) promoting innovation (herein, of the Massachusetts Experimental Schools Project); d) protecting minority interests (herein, of the Racial Imbalance Act) e) setting minimum curriculum standards (herein, of why they have never been promulgated); f) enforcing the school laws.

As noted in Section II, the present organization of state education agencies consists of the pre-1965 structure, with modifications that are designed to give the state agencies sufficient authority to deal effectively with the deficiencies in the Massachusetts public schools that were revea' by the Willis-Harrington Report. One commentator summarized the r findings as follows:

> "[C]ities are performing poorly when measured by such 'objective' criteria as reading ability, verbal and non'verbal skills, dropout and attendance levels and the proportion of children entering colleges or high quality training programs and it found an absence of strong and innovative leadership among the educational officials, on the state and local level, who are charged with governing the cities' schools...(T)he Commission recommended...a restructuring of institutions at the state level in order to uplift the quality of education, increase leadership capabilities and strengthen state-local relationships. The Massachusetts legislature responded by greatly expanding the powers of the Department of Education to deal with elementary and secondary education."[3] [footnotes omitted]

Among the most notable amendments were those that a) gave the Board unequivocal authority to obtain a wide range of information from school committees; b) created a general power to sanction districts in non-conformity with law or regulation by withholding state aid; c) mandated the promulgation of minimum curriculum standards; d) created MACE; e) authorized experimental schools projects.

The ultimate policy-making body is the Board, which has eleven members appointed by the Governor, a student representative, and two non-voting ex-officio members. The Board appoints the Commissioner by a two-thirds vote (and he can be removed by a majority vote). The Commissioner, in turn, nominates for Board approval a person to serve as Deputy Commissioner. The Commissioner is the executive head of the Department of Education. The 1965 Act required the Board to create five divisions within the Department, and subsequent laws have added two more divisions, the new departments reflecting the legislature's priority concern with particular curriculum areas -- special education and occupational training. The divisions are: curriculum and instruction; administration and personnel; research and development; school facilities and related services; state and federal assistance; occupational education; special education.

The Commissioner lacks an independent political base, and is not subject to the tension of being legally bound to follow Board policy but politically obliged to support the perhaps contrary policies the advocacy of which was responsible for his election. Since there is no fundamental institutional dichotomy between the Board, on the one side, and the Commissioner and Department, on the other, we will henceforth use the term "Board" as a shorthand reference to this triad of state bodies. We turn now to our examination of the Board's legally defined role.

A. Information and Planning Center

Perhaps the oldest concept of the Board's function is that it should be a clearinghouse for information about educational issues in the state. This idea is currently reflected in the following provisions in M.G.L.A. c. 15, §1G.

> "The purposes of the board shall be to support, serve and plan general education in the public schools . . .
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> "The board shall be a communication and information center serving all public schools in the commonwealth. . .
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> * * *
>
> "The board shall provide centralized, state-wide, long-range planning service for public schools. . . "

Elsewhere in this section, the Board is granted authority to use specific means to carry out this function.

> "The board may collect and maintain information from any public school system in the commonwealth relevent to its work or requested of it by the advisory council on education."
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> * * *
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> "The board and commissioner of education may seek relevant information from other states and institutions and from departments, divisions, authorities, and agencies within the commonwealth."
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> * *

> "The board may employ, from time to time, such consultants and experts as the commissioner may recommend to study specific matters of concern to the department."

The authority of the Board to obtain information from school committees enjoyed an unusual (for Massachusetts) degree of judicial protection even before the 1965 Act. In 1964, the Commissioner sent out racial census forms, and the New Bedford School Committee refused to complete them. The form had not been included in the annual return which the committee was explicitly required to fill out, and the incident occurred before the passage of the Racial Imbalance Act, which specifically required the taking of racial censuses. Nevertheless, the Supreme Judicial Court (SJC) held that the form must be filled out, and failure to do such would be a condition activating the Board's sanctioning powers.

It was said that several statutory provisions, construed together, established the intent of the legislature to confer wide information-gathering powers on the Commissioner:

> "We have no doubt (a) that the commissioner has power to require relevant, unsworn information, reasonably required by him, to be filed by local school authorities separately from the annual return, or (b) that the production of such separate information may be enforced by mandamus..." [4] (emphasis added)

The Court implied that the commissioner could have made the census part of the formal annual report, if he had stated that intention and required sworn statements. That would have activated his power to withhold state aid in event of noncompliance. No doubt was left about the reasonableness of seeking the information at issue:

> "We take judicial notice...that information about the racial composition of student bodies may be of value to the [education] department's work..." [5]

The Board's most ambitious information gathering project has been the Massachusetts Educational Assessment Program. In his budget message

endorsing the program, Governor Sargent pictured it as an aggressive evaluation that would put local school officials on the spot, and stir up grass-roots pressures for changes.

> "A major initiative next year will be a $400,000 educational assessment program. The Department of Education will utilize various national educational testing and evaluation organizations to initiate a comprehensive program to measure educational results....
>
> (I)t will give parents the data to measure how well their school systems are doing in educating children... (and) will give parents the tools they need to hold local administrators accountable. More than additional staff and regulations coming from Boston, this program has the capacity to use the democratic process to force needed improvements in Massachusetts education."[6] [emphasis added]

The first phase of the program was carried out in 1974-75. The Board has issued eight interesting booklets reporting the results. The evaluators used a methodology which was intentionally designed to prevent the findings from being used to put particular districts, schools, administrators or teachers on the spot.

> "The testing, data recording and analysis procedures contained controls which guarantee that no data can be obtained that identifies particular students, schools, or school districts."
> Summary and Policy Implications, 1974-1975,
> Massachusetts Educational Assessment program,
> Massachusetts Department of Education, p. 1.

The actual testing was in these areas: reading, mathematics, decision-making (on a population of 18,000 nine and seventeen year old pupils in 338 schools); occupational knowledge and occupational attitudes (only the seventeen year olds in the population). Also, 17,000 Massachusetts citizens were surveyed to determine what they thought about the state's educational goals and performance. Many useful comparisons are made with the data -- exclusive of ones that would require

identification of particular students, schools, districts. For example, it was found that Massachusetts nine-year-olds led the nation in critical reading skills, but that the state's seventeen-year-olds failed to maintain that degree of pre-eminence. Or, to take an example from the value testing, it is reported:

> "Differences in values among different socioeconomic groups were examined. The findings suggest that the higher a student's socioeconomic class, the greater the student's tendency to feel he controls his actions and to draw upon such values as Delay of Gratification, Stability of Commitment, and Responsibility in Task Performance. Lower class students, on the other hand, are more concerned with basic economic security and are more worried about the potential hardships of others.
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> * * *
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> "Responses of students from four kinds of communities were also compared. . . . [R]espondents from Residential Suburbs place a relatively stronger emphasis on using personal resources . . . than do other respondents. This finding documents the value of having programs in which suburban and urban students are brought together." [emphasis added] Summary, supra, pp. 4-5.

The assessment reports raise many provocative questions about curriculum reform. However, unlike testing programs in other states that also have been called "assessment," this one cannot be used to give merit ratings to particular schools, administrators, and teachers. Nor is it structured in a way that creates a direct incentive for instruction to be tailored so as to "teach for the test". Obviously, the tests are intended to influence curriculum reforms, but only through the mediation of local officials who are persuaded, not coerced, by inferences made from the results. The evolution of the assessment program into its present form is perfectly consistent with the generally decentralized pattern of curriculum authority in Massachusetts.

B. Support for Localities, Liaison with Federal Government

There is increasing recognition that localities do not have sufficient resources to solve many major problems. A recent study by MACE concluded that school committees are overburdened with tasks that they are ill equipped to perform.[7] Local superintendents are in the same position. A superintendent's staff suppo does not compare to that of a manager in the private sector with sim ar responsibilities. (The study notes a trend for superintendents to see themselves more as advisors than an executives.) The thrust of the study's recommendation is to take off the backs of the committees those tasks which can be dealt with more rationally, effectively and economically on an interdistrict or statewide basis. Collective bargaining is the prime example — notwithstanding the Massachusetts tradition of giving school committees absolute school committee control over fixing teacher's salaries.

Some provisions which speak to this problem are found in c. 71, §1G.

> "The board may provide such necessary services to local public schools as are beyond their capacity to support separately."
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> * * *
>
> "The board shall provide a common center for the development, evaluation, and adaptation of educational innovations for public schools."
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> * * *
>
> "The board . . . shall be the planning and approving authority for federal programs to be undertaken in the commonwealth."
>
> * * *
>
> "The board shall delineate and locate such other supporting services so as to improve the operation of all public schools and the quality of their educational programs."

Also, under the Racial Imbalance Act, M.G.L.A. c. 15, §1F, upon a determination of racial imbalance the board must give the school district involved technical assistance in developing a plan to remedy the situation.

C. Encouraging Innovation

Under M.G.L.A. c. 40, §4E, school districts may enter into agreements to jointly conduct model educational programs, subject to the approval of the Commissioner. The Board has an affirmative duty to work towards innovation under c. 15, §1F:

> "The board shall provide a common center for the development, evaluation, and adaptation of educational innovations for public schools."

Also under this section, the board is authorized to establish,

> "no more than three experimental school projects for the development of educational innovations."

The procedure for planning and establishing such systems also appears in that section. Under this authority, the Board established the Massachusetts Experimental School System (M.E.S.S.), its organization is unique to Massachusetts. M.E.S.S. grew to include three schools offering instruction from K-12. It is a cross between a magnet school, (its intended multi-racial target population was supposed to be drawn from several municipalities, a goal that was not achieved) and a community controlled school (because of the school-level mechanisms for parent participation in governance. The M.E.S.S. governing board was directly responsible to the state. An argumentative evaluation of M.E.S.S., as of Spring, 1974, is set out in the margin.[8]

D. Protection of Minorities

This goal is not stated in the enumeration of Board purposes in c. 15, §1G, but it is clearly implied by the Racial Imbalance Act, and the Transitional Bi-lingual Education Act, and the Special Education Act. Although these laws are structured to encourage state-local cooperation to solve the problems they are directed at, they also give the Board authority to act forcefully and to apply sanctions when necessary. In particular, state attempts at enforcing the Racial Imbalance Act led to a stream of litigation before the Supreme Judicial Court. The Court tried, but failed, to maintain the same low profile it had kept in almost all previous education agencies, by defering to administrative discretion.[9] The irreconcilable collision between two educational agencies forced it to adapt its doctrines of administrative review to rationalize decision of the cases. In the final part of this section, we examine the legal principles regarding state-local relations that emerged from this litigation.

The Racial Imbalance Act was amended — really, watered down -- in July, 1974. (St. 1974, c. 636). Under the new law, a school committee did not come under a duty to eliminate imbalance as soon as such imbalance was determined. Rather, only if individual parents requested transfers for their children out of imbalanced and into balanced schools, and if these individual requests could not be satisfied by ad hoc transfers, was it necessary to devise a general plan of balancing. Also, there was a beefing up of subsidies for local programs that reduced imbalance, included full reimbursement for transportation costs, substantial reimbursement for establishing magnet schools (which is a direct intersection of curriculum policy and desegregation issues), and a $500.00 per child bounty on transfers that reduced imbalance. Finally, the

Board was newly precluded from ordering localities to carry out specific student transfer plans.

The amendment raised the question of the continuing validity of previously court-affirmed orders of the Board. In School Committee of Springfield v. Board of Education, 319 N.E. 2d 427 S.J. Ct. Mass. (1974) the Supreme Judicial Court held that the prior balancing orders remained in effect. It did not decide the question whether the legislature had intended to nullify orders issued under the previous law, stating that even if the legislature had so intended, the amendment was pro tanto unconstitutional under the Fourteenth Amendment, Reitman v. Mulkey, 387 U.S. 369 (1967).

Meanwhile, the Boston imbalance controversy was superceded by Morgan v. Hennigan, 379 F.Supp. 410 (1974) in which a federal court determined that the Boston School Committee had practiced de jure segregation. Although the amendment of the law apparently will not change the situations in Springfield and Boston, it has potential for limiting the remediation of racial imbalances that can develop elsewhere, in the future. The state law reaches situations not covered by Fourteenth Amendment doctrine, since its duties are made applicable upon merely a finding of de facto segregation. (Conversely, de jure discrimination in assignment of black pupils which does not result in any school situations with a majority non-white population would create liability under the Fourteenth Amendment but not under the Imbalance Act.)

E. Minimum Standards

The potentially most important new provision in the 1965 reorganization was this addition to c. 15, §1G:

> "The board shall establish minimum educational standards for all courses which public schools require their students to take." [emphasis added]

In the decade since this enactment, minimum standards have not promulgated. On the face of it, this looks like a situation where the Board may have buckled under to local resistance to the ideal of state curriculum control. The actual history of the failure of the Board to approve minimum standards is quite different from what one would expect. However, it may be appropriate to transfer one's suspicions about Board reluctance to step out of its traditional bounds, despite its statutory duty, to explain the continuing failure to set standards. The assessment project might be seen as a means for accomplishing many of the objectives of minimum standards, without acting in a coercive manner.

Before telling the story of the one concerted attempt to comply with this provision, one should note that even as stated, the law falls far short of giving the Board power to prescribe subjects and courses of study. The minimum standards only attack required courses -- i.e. those mandated directly by statute or made a mandatory part of the curriculum by the school committees. Moreover, the term "minimum" leaves no doubt that the legislature did not intend any substantial interference in the details of selecting instructional goals, methods, and materials.

The Missing Minimal Standards[10]

When we asked the Department for its minimum curriculum standards we were told that none existed. The same scene had been played several years earlier, when Neil Sullivan, beginning his work as Commissioner, asked to see the standards and was told the same answer. Sullivan appointed staff member Dr. Lawrence Bongiovanni to the job of supervising

the drafting of standards for submission to the Board for approval.

The project had three stages. First, Bongiovanni met with superintendents, principals, department head, and teachers -- about 250 in all -- to get a general idea of what the standards might be and how they might function. Interestingly, Bongiovanni did not seek out representatives of parents and students at that time, but he says that if he were given the assignment today, because of the new recognition of and institutionalized participation of these groups, he would naturally include them in an opinion survey. Since the Willis-Harrington Report had prompted the standards clause, it was a source of some ideas. For example, its repeated cirticism that many schools were using outdated curriculum guides and materials is reflected in a drafted standard requiring current copyright dates in textbooks. It should be noted that some kinds of standard setting had already been mandated under other statutory provisions:

> "minimum length for a school day and the minimum number of days in t school year."
>
> "appointment of professional personnel in the public schools."
>
> "Maximum pupil-teacher ratios. . . "
> M.G.L.A. c. 15, §1F

In the second phase, regulations were drafted and circulated and public hearings were held. Then modifications were made in response to comments at hearings and other criticisms that were communicated to the Department. The position paper was a November 1969 draft. Its standards were content descriptive. They covered not only academic subject matters, but also the quality and availability of auxiliary services -- library and media facilities; health; pupil counseling; special education; extracurricular activities; and free summer school for all students. Also,

the Music standards provided for instrumental and choral training. In general, the academic requirements were modern and informed, but not heavily demanding -- which is, of course, appropriate for "minimums." Particular care was taken with science, a subject not statutorily mandated -- a non-textbook, laboratory approach was stressed. Schools were encouraged to have foreign language electives for elementary school pupils. Health education mentions "family living," but not sex education. The reading standards emphasize individualization, and remedial programs in the elementary schools.

In the criticism phase, three main concerns emerged. First, some persons advocated the setting of time requirements for instruction. (The Willis-Harrington Report stated only that the curriculum guides in a large number of schools called for only thirteen minutes of math instruction each day -- while many children elsewhere in the commonwealth were getting four times that much math training.) This suggestion was rejected, however, except for the designation of 120 minutes of physical education instruction each week.

Second, officials in districts with programs that far exceeded the minimum requirements in many areas were afraid that the state standards would be used as a springboard for economizing cut-backs. To some extent, Bongiavonni alleviated that concern by working up plans to follow up the minimum standards with a separate document featuring recommendations of highest quality curriculums, and commending those schools in which those standards were being achieved.

Third, officials in districts falling below the standards in important respects, but without any prospects for raising the money to do the necessary upgrading, anticipated being caught in a squeeze between

raised expectation and limited resources. There was no easy answer to that problem. However, in his position as supervisor of federal aid grants, Bongiovanni was able to give some assurances that the state could channel some extra funds to the hard-pressed districts.

The third phase is an anti-climax. The Board considered the regulations and rejected them. The reason, apparently, was that several members did not want a set of descriptive standards, but behavioral objectives. Ironically, of the many criticisms and suggestions Bongiovanni had received during the development of the final draft, the behavioral approach was hardly mentioned, if at all.

Thus, there are no state-wide curriculum standards in Massachusetts. The Department does develop curriculums, for example, a consumer education curriculum was recently published, but they are strictly advisory. Moreover, full-fledged curriculum development projects in the Department may decline in number in the future, because the Department itself is decentralizing. Under the Regionalization Plan,[11] the Department is decentralizing its staff assignment, and creating regional office teams. Subject area specialists, as they are assigned to regional offices, will be increasingly called upon to serve as generalists. One of the consequences of the regionalization may be increased reliance on local curriculum innovation, but greater and more flexible support of local efforts through the availability of regional teams working closely with the communities in their areas of responsibility.

F. Enforcing the School Laws

The general sanctioning powers of the Board are stated in M.G.L.A. c. 15, §1G.

> "The board may withhold state and federal funds from school committees which fail to comply with the provisions of law relative to the operation of the public schools or any regulation of said board authorized in this section."
>
> "The board shall see to it that all school committees comply with all laws relating to the operation of the public schools and in the event of noncompliance the commissioner of education shall refer all such cases to the attorney general of the commonwealth for appropriate action to obtain compliance." [emphasis added]

The Board came eyeball to eyeball with the Springfield and Boston school committees in its attempts to enforce the Racial Imbalance Act. It was a difficult context for testing the sanctioning powers of the Board, because it was not a simple matter to determine what acts or failures to act constituted noncompliance with the law. The courts were not eager to decide whether school committee balancing plans which purported to satisfy the statute were, in fact, sufficient. And even when non-compliance was determined, withholding of state funds was found to be a last resort means for forcing compliance. By the time of the last in the series of cases reviewed below, however, the court clearly stated that the last resort was almost at hand.

The operation of the Racial Imbalance Act (prior to the 1974 amendment) may be briefly described as follows.[12] It declares the state's policy of encouraging school committees to prevent and eliminate racial imbalance in the public schools. School committees must submit sufficient information to the State Board of Education to enable it to determine the racial composition of the schools in every district. Whenever the Board determines that a school has greater than fifty per cent non-white pupils, it notifies the appropriate committee in writing. After notification, the committee must develop a plan for eliminating

the imbalance, and file the plan with the Board. If the Board considers the plan inadequate under the Act, it is supposed to submit recommendations for changes. The recommendations must be specific, and they must be accompanied by an offer of technical assistance.

At this point law suits may arise. The committee may reject the Board's recommendations, and seek a judicial determination that they are not in accordance with the Act. The statute lays out a formal standard for reviewing Board action:

> "(a) in excess of the statutory authority or jurisdiction of the board, or (b) based upon an error of law, or (c) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law..." [13]

The committee might, on the other hand, submit a revised plan, which the Board rejects. The Board can then petition the court to order the committee to implement the board plan. The Board also has a self-help remedy. It may cause state aid payments to be withheld from a committee

> "which does not show progress within a reasonable time in eliminating racial imbalance..." [14]
> (emphasis added)

Thus far, the Board has found it harder to defend aid cut-offs under the "reasonable time" standard, than to defend the revisions it has imposed on local desegregation plans. In each of two cases[15] the Court simultaneously ordered the Board to release withheld funds and enjoined the school committee to implement the Board's plan for their district.[16]

With that background, it is possible to summarize the legal ground-rules that have emerged from the state-local conflict. One set of rulings tends to strengthen the legal position of the school committee:

a) The Board must accept the school committee's imbalance plan if it reasonably appears to be designed to achieve racial balance (and

complies with other statutory requirements.)[17]

b) When reviewing a local plan, the Board is bound by factual determinations of the committee, if based on substantial evidence.[18]

c) The Board must consult with the local school committee (not just the local education department) about all significant issues in state/local negotiations.[19] If the Board, without consulting the committee, revokes its approval of a city plan, and takes action based on the revocation, that action is "arbitrary."[20]

d) The Board's recommendations must be specific, and its technical assistance must be substantive -- more than a series of demands. Failure to meet these standards is a basis for finding an action "arbitrary."[21]

e) The basis for the Board's orders must be clearly present in the Imbalance Act. A Board order based on its opinion that a plan violates the Equal Protection Clause of the United States Constitution is an action in excess of its jurisdiction.[22]

These rulings are generally to the Board's advantage:

a) By virtue of the Board's position as enforcer of the Act, its finding that a local desegregation plan is inadequate as a matter of law is entitled to great weight.[23]

b) If the Board (correctly) concludes that even if a local plan's factual assumptions are correct, its implementation would fail to satisfy the Act, then it need not address the question whether those assumptions were supported by substantial evidence.[24]

c) Once a city's plan is found to be inadequate as a matter of law, then the Board's plan becomes the basic agenda. It is binding on the school committee if based on substantial evidence.[25]

d) Five years of racial imbalance is enough.[26]

These rules establish a coherent legal regime that captures much of the spirit of traditional school law doctrine without undermining the intent of the legislature. A school committee that reads the statute intelligently and acts in good faith, has ample opportunity to formulate its own mode of complying with the desegregation mandate. It can pool its technical resources with those of the state to design a plan which takes local needs into account as much as possible. If, for example, desegregation seems to require new school construction, the school committee can integrate that necessity into a long-range program of building and reorganization aimed at achieving a whole range of community goals. Throughout the desegregation cases, the Supreme Judicial Court emphasized that the statute was designed to foster a <u>cooperative</u> effort to solve racial problems in the public school system.

> "We...envisioned a situation in which both sides would come forward with renewed and sincere efforts to fulfill the mandate of the statute. The hearing process would then have provided an opportunity for 'that measure of cooperation which citizens have the right to expect from State and city agencies working in the same field.'"[27]

But the legislature also contemplated that attaining racial balance would require selective use of pressures and sanctions. This, too, is taken into account in the decisions. The tipping point in the local/state balance is reached if the school committee submits an unlawful plan or makes no substantial progress in correcting imbalances over a period of years. Then the presumptions of validity shift to the side of the Board of Education. Subsequent non-compliance is a signal for the Board to train its fiscal cannons on the intransigent committee. The actions

of the Boston School Committee demonstrated the value of a state administrative remedy. Despite its usual reluctance to get involved with the details of desegregation, the Court, in Boston III, went so far as to encourage the Board to use its sanctioning powers in the future:

> "If the Committee sincerely desires the correction of perceived defects its task is not one of litigation but of consultation and persuasion....without the delay inherent in further footless resort to the courts."
>
> * * *
>
> "If the Committee fails to cooperate, the Board has the power to withhold the certification of State aid for the Boston Schools, and to notify the School Building Assistance Commission to withhold approval of school construction projects."[28]

IV. Courts

A. Introduction & Summary

In order to successfully appeal to the courts an official decision affecting public school curriculum, a person must overcome three obstacles. First, he must find a legal theory that gives the court authority to review the decision in dispute. Second, he must show that he is a proper party to invoke that jurisdiction — i.e. that he has standing. Finally, he must persuade the court that the official action was unlawful.

In Massachusetts, the first obstacle is relatively manageable. Only a limited class of school disputes are covered by special statutory review procedures — namely, those involving dismissals of teachers, and those growing out of some phases of applying the Racial Imbalance Act. This section is primarily devoted to the state judicial review action under which the bulk of curriculum-related cases are brought. In Massachusetts, the Declaratory Judgment Act and the Administrative Procedure Act are the most important ones.

Both of these laws are uniform acts which state court decisions have given important secondary meanings. The Supreme Judicial Court has been relatively generous in allowing declaratory actions to be brought. With the Administrative Procedure Act (APA), one might say that the Court has been moderate to liberal. Lest these labels be taken for more than they are worth, one should be especially aware of the Court's tendency to carefully analyze the purposes behind the statutory/administrative scheme within which the dispute is set, in deciding whether the legislature intended for judicial review to occur in the instant situation. This is preferable to the literalist approach of some courts which apply the review act without much sensitivity to the particular

legal context of the underlying dispute. Thus, the stronger the litigant's case on the merits of the applicable law, the more likely it is that the court will find that the legislature would not have contemplated such a case escaping judicial review.

Massachusetts standing doctrine is far from harsh, but also far from clear. A major issue is the standards under which a party who alleged no private harm different from that suffered by the public generally can seek judicial review of official action on behalf of allegedly violated public rights.

The difficult problem is not getting a court hearing but winning it. Massachusetts courts are extremely deferential to administrative decision-making, and perhaps no area better illustrates that generalization than review of school committee decisions. The scope of judicial review by state courts is extremely narrow. This has been true even in cases presenting serious federal constitutional claims. Consequently, the challengers of school officials have increasingly turned to the federal courts. These courts have not hesitated to adjudicate the cases, as shown by their reluctance to apply the abstention doctrine. The decisional pattern, meanwhile, is mixed. Where the plaintiff's claim is based on due process, the First Circuit has been quite willing to find rational connections between official actions and legitimate educational goals, thereby absolving the decision in question from the charge of arbitrariness and capriciousness. On the other hand, the circuit has been much harder on officials who have been challenged by substantive due process and free speech claims.

B. Standing

A state's standing doctrine determines what minimum relationships must exist between a party, and an act which he alleges is unlawful,

before a court will permit him to adjudicate his contention of illegality. The standard formula is that the party must state some legally cognizable injury to him, personally, if the court is to listen to his claim.

The Supreme Judicial Court has given legal cognizance to a relatively broad spectrum of interests. Also, it has interpreted the Mandamus Act so as to allow private persons to bring suit to vindicate purely public rights. One should not be surprised if Massachusetts standing rules are more liberal than federal constitutional doctrines -- the state courts are not subject to a provision parallel to the Article III "case and controversy" requirement. In fact, the Massachusetts Constitution creates jurisdiction for the Supreme Judicial Court to render advisory opinions. This jurisdiction is frequently invoked.

Just because a person is not barred from raising an issue by state constitutional doctrine does not assure that he is a proper party. If his claim is based on state statutory law, then he must have statutory standing, and that may depend on whether the administrative procedure act, the mandamus act, or the declaratory judgment act is applicable. Standing under the declaratory judgment act requires a showing of an actual and justiciable controversy -- the Massachusetts rules pretty closely track federal rules for standing in declaratory actions. There are no arduous standing restrictions on bringing mandamus actions; the other requisites of this action, however, are very difficult to satisfy. Finally, the standing requirements of the APA are typical of laws of its kind. There are, for example, no potentially difficult technical obstacles of the kind noted under Arizona's Judicial Review Act.

There are no notable trends in the way the Supreme Judicial Court applies federal standing doctrines to cases presenting federal constitutional

claims. Theoretically, the Court could interpret Massachusetts standing doctrine so as to allow a plaintiff to press a federal claim in state court, even though the federal courts would lack jurisdiction over the case because the party failed to satisfy the Article III case and controversy requirement.[1] In a recent First Amendment case, the Supreme Judicial Court showed that it had no intention of expanding on the federal limitations on a party's standing to challenge a statute which has been constitutionally applied to him, on the ground that it could conceivably be applied unconstitutionally to other persons in situations not before the court. Commonwealth v. La Bella, 74 A.S. 83, 306 N.E. 2d 813 (1974). See also, Goguen v. Smith, 471 F.2d 88 (1972); Paddock v. Town of Brookline, 347 Mass. 230, 197 N.E. 2d 321 (1964).

A few points need to be made about standing of litigants in school disputes. School committees have been held to have standing to sue a variety of parties, and to raise a variety of legal issues in proceedings to which they are parties. However, there may be some question about a school committee's standing to raise the issue of the constitutionality of a statute which is being applied in a case affecting it. When a statute was passed which in effect reversed a taking by emminent domain, (the law described the land that was purportedly taken for school purposes, and ordered the committee to reconvey it to the previous owners) it was held, in an action for declaratory relief, that the committee did have standing to challenge the constitutionality of the statute. Wachusett Regional School District Committee v. Erickson, 353 Mass. 77, 228 N.E. 2d 62, modified; 354 Mass. 768, 238 N.E. 2d 369 (1967). Similarly, in a declaratory action brought by a school committee during the Imbalance Act litigation, it was held that the school committee could raise

constitutional questions. The court noted, however, that the other party had not challenged the committee's standing. School Committee of Boston v. Board of Education, 352 Mass. 793, 227 N.E. 2d 729, appeal dismissed 389 U.S. 572 (1967). There was a contrary holding in a 1955 case. As defendant in a mandamus action to compel it to provide transportation for pupils attending private elementary schools, a committee tried to challenge the constitutionality of the transportation statute, but the court rebuffed it on standing grounds. Quinn v. School Committee of Plymouth, 332 Mass. 410, 125 N.E. 2d 410 (1955). In noting that the committee had no personal or property right involved in the decision, the court appeared to be applying the restrictive doctrine of taxpayer standing laid down in Frothingham v. Mellon, 262 U.S. 447 (1923). That is, the school committee could not raise an issue that taxpayers as individuals could not raise. In light of the implicit overruling of Mellon subsequently, in Flast v. Cohen, 392 U.S. 83 (1968), and in light of Erickson, it is unlikely that Quinn still has any vitality.

Student standing has rarely been litigated. In most cases it is clear that the child stands to sustain injury to legally cognizable interests -- liberty, property, reputation, educational opportunity. The recent decision in Goss v. Lopez, 43 U.S. 4181 (1975) reaffirms the substantiality of the student's interest involved in what is done to him in the public schools. (It was held that suspension from school for less than ten days was an interest sufficient to bring into play the protections of the Due Process Clause.) Also, the United States District Corut, District of Massachusetts, took a liberal approach to standing requirements in a case involving a student's claim of First Amendment protection. In Antonelli v. Hammond, 308 F.Supp. 1329 (1970), a student who resigned as editor-in-chief of a student newspaper, largely out of unwillingness

to submit issues to a faculty advisory for approval, was held to have standing to seek adjudication of the constitutionality of the advisory procedure. It was also noted that the plaintiff had a substantial prospect of being re-elected to the editorship.

This survey of Massachusetts standing doctrine needs some amplification as to the interaction of the general doctrine and the above referred to "exception" for mandamus actions. The leading case on this question is Kaplan v. Bowker, 333 Mass. 455, 131 N.E. 2d 372 (1956). The legislature had established a commission to investigate communist and subversive activities and had ordered it to report to the legislature the names of any individuals about whom the commission had received credible evidence that they had engaged in such activities. Several lawyers, none of whom alleged that they had been investigated or otherwise privately affected by the commission's activities, sought a writ of mandamus compelling the commission to refrain from making any such reports. They alleged that such reporting violated provisions of the state and federal constitutions.

The Court recited the general principle that only persons in danger of suffering legal harm can invoke the court's jurisdiction to pass upon the validity of legislative acts. (Footnote 1 of the opinion cites approximately twenty Massachusetts cases for authority.) The Court then noted a partially countervailing principle, namely,

> "that where a public officer owes a specific duty to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer any member of the public may compel by mandamus the performance of the duty required by law." [emphasis added] 131 N.E. 2d at 375. (Another twenty or so cases are cited for this doctrine)

However,

> "Some of the cases add . . . that no other method of enforcement be available." 131 N.E.2d at 375.

The Court held that the petitioners failed to come under this mandamus exception for allowing enforcement by anyone of public rights. Because the commissioners reported to the legislature, it was found that they owed

> "no duties directly to the public of which the public has the right to demand performance." 131 N.E. 2d at 372.

Of course this "reason" is merely a conclusion, since by the rule stated above, whether or not the public has a right to demand performance depends on whether there is a "specific duty" to the public.

One can only guess that the Court was trying to avoid a confrontation with the legislature on an extremely sensitive issue. Kaplan left the law in an easily manipulable form -- if a court wanted to open its door to litigants pressing a public right, it would announce that the right in question was directly owed to the public; to close its doors it needed only to announce that the public right was either too insubstantial or too indirect. We can only hope that the next time the Court deals with this issue it will announce a rule which gives litigants more guidance.

C. Declaratory Judgments

Generally speaking, the declaratory action is a residual action, one to which a litigant may turn when he lacks a specific statutory procedure for vindicating his rights. There are, of course, some limitations to its use, but the Massachusetts courts have applied them no more stringently than is necessary to further clear legislative policies (e.g. those favoring initial administrative rather than judicial adjudications of some classes of disputes.) Massachusetts has adopted the Uniform Declaratory Judgments Act, which is codified as c. 231A, sec. 1 et.seq. The Act, by its own terms is "remedial", that is, "additional" to other procedures for declaratory relief. The Supreme Judicial Court has said that it is to be "liberally construed." Woods v. State Bd. of Parole, 351 Mass. 556, 222 N.E. 2d 882 (1967).

The SJC will not easily find that another statute was intended to preclude, in a given situation, judicial review under c. 231A. For example, in Westland Housing Corporation v. Commissioner of Insurance, 225 N.E. 2d 782 (1967), the SJC held that plaintiffs who failed to satisfy the jurisdictional requirements of the Administrative Procedure Act could nevertheless secure judicial review of agency regulations under the Declaratory Judgment Act. Also, Westland illustrates the SJC's willingness to carefully examine the statutory policies involved in the interaction of the declaratory action and other laws, and to base its holding on a conclusion about these policies. By comparison, the approach of the Arizona Supreme Court to such problems is extremely literalist.

The fundamental limitation on the availability of declaratory actions is the "actual controversy" requirement.[2] There must be a real dispute

between the parties who have antagonistic claims which will almost certainly lead to litigation in the near future. It is not necessary, however, for it to be alleged that a legal right has yet been breached for declaratory relief to be proper. To the contrary -- one of the purposes of the act is to minimize the antagonistic actions of the parties and to simplify the adjudication of the dispute, by declaring legal rights before drastic actions are taken. For example, in School Committee of Cambridge v. Superintendent of Schools of Cambridge, 320 Mass. 516, 70 N.E. 2d 298 (1946), the question was whether or not the superintendent and assistant superintendent were holding their positions at the discretion of the school committee (serving "at discretion" amounts to having tenure). The relevant statute was unclear on the point whether prior service in other administrative positions in the school district counted towards the years of experience required to be tenured in their present positions. The Court said that this was a proper situation for giving declaratory relief. It was unnecessary for the plaintiff school committee to purport to not rehire the defendants, or otherwise to precipitate a more antagonistic situation. Court review was possible prior to such acts which might harm educational administration in the district.

In Povey v. School Committee of Medford, 333 Mass. 70, 127 N.E. 2d 925 (1955), the SJC dismissed a petition for declaratory relief. The local school superintendent had recommended one person for appointment to a principalship, but the school committee gave the post to a different person -- who happened to be the brother-in-law of a school committee member. It was alleged that the appointee was not qualified for the post. The Court said that the plaintiffs, who were taxpayers, did not have enough special interest in the controversy to bring a declaratory action. The Court also

noted that the plaintiffs had alleged no violations of law by the defendants, only a bad faith act. Under those conditions, a suit would be no more than harrassment. Presumably, the Court's idea of a proper plaintiff would be one who claimed that the committee's action violated his contract rights. In light of the SJC's other decisions in this area, Povey is properly confined to its facts, i.e.,a situation where no specific statutory or contract right is in the case, but where there is, instead, a controversy but no right.

Another potential obstacle to maintaining a declaratory action is the limitation on its use where a statute makes another remedy exclusive. The other remedy may be a special action for judicial review with its own set of requirements; or it may be an exclusive administrative remedy; or it may be an administrative remedy which must be exhausted prior to applying for court review. The Supreme Judicial Court summarized the general rule and an exception to it in its opinion in Westland, supra:

> "Ordinarily declaratory relief is not available to bypass an administrative remedy, even if the administrative remedy is no longer available because it had not been pursued within the time prescribed. But '[i]n certain exceptional instances this court has upheld the granting of declaratory relief in the discretion of the court,' even where a statute purports to make administrative remedies exclusive." (citations omitted) 225 N.E. 2d at 788.

The exception will apply in cases of hardship to the declaratory plaintiff. For example, in Westland the plaintiff first became aware of a decision made by the Commissioner of Insurance several years later, when that decision was applied to its activities. Although the statute under which the decision was made had a provision giving parties to the proceeding a right to judicial review for a limited time, it was held that the law was designed,

> "to permit review by . . . parties to the proceedings . . . or [persons] who were at least on notice that their interests might be affected." [emphasis added] 225 N.E. 2d at 788.

Since the plaintiff fit neither description, it was allowed to pursue its declaratory action.

Again, we can note a sharp contrast between the approaches of the Massachusetts and Arizona courts, even though the declaratory action statutes are identical in the two states. It will be recalled that in Arizona Commission of Agriculture and Horticulture v. Jones, 91 Ariz. 183, 370 P. 2d 665 (1965), the plaintiff was barred from challenging an administratively made fact-finding which was several years old and arguably outdated, but was given as the continuing basis for agency policies affecting the plaintiff. The cases could perhaps be distinguished on technical grounds, e.g. that the Arizona plaintiffs hadn't properly put the question of declaratory relief at issue, so that the court didn't directly confront it, the Massachusetts court probably would have considered this a hardship case and allowed the plaintiff to pursue a declaratory action. The Arizona court's analysis, by comparison, never went beyond verbal analysis to probe the policies of the relevant statutes and the questions of fairness and efficiency in the administrative and judicial processes.

Westland is also notable because it settles an important question about the interaction of the APA and the DJA. Section 14 of the APA provides for judicial review of final decisions of agencies in adjudicatory proceeding; in section 1, an adjudicatory proceeding is defined as one which is required by law to be held for the purpose of deciding the legal rights of persons. The plaintiffs in Westland had asserted that a "hearing" held by the Commissioner was a reviewable adjudicatory proceeding.

However, the court found that this "hearing" was not required by law to be held, therefore it did not satisfy the definition in APA section 1, and plaintiffs had no right to review under section 14.

The question was whether plaintiffs, having failed to establish reviewability under APA section 14, could nonetheless pursue a declaratory action. APA section 7, provides:

> "Unless an exclusive mode of review is provided by law, judicial review of any regulation may be had through petition for declaratory relief in the manner and to the extent provided under . . . [the DJA]." [emphasis added]

The Court had already found that the Commissioner's action was not an "adjudicatory proceeding" as defined in APA sec 1(1); it was also clear that the action did not satisfy the act's definition of "regulation," as found in sec. 1(5). Was the purpose of the legislature in passing section 7 to preclude judicial review under the DJA of an administrative action which neither fit the technical definition "adjudication" nor "regulation"?

The court's answer was, No. It said:

> "We believe that the purpose of sec. 7 is to negate an inference, which might otherwise be drawn from sec. 14, that only a 'final decision of any agency in an adjudicatory proceeding' may be judicially reviewed." 225 N.E. 2d at 787.

In other words, as it appears in sec. 14, "regulation" does not have the technical meaning set out in sec. 1(5) — the purpose of the latter definition is to determine when the special hearing requirements of sec. 2 attach -- but loosely refer to a range of agency actions which are not adjudications. Of course, all of these loosely defined "regulations" are not automatically reviewable under the DJA, since that act has its own requirements that must be met. But when an agency action of this kind is involved, the APA in no way limits the opportunity for relief by a declaratory action.

Since a fairly strong argument could be made for an opposite holding on this question, the court's decision must be taken as a recognition of a state policy strongly favoring declaratory actions. The argument that another statute precludes declaratory relief will be rejected unless such intention is clearly expressed.

The final obstacle the plaintiff seeking declaratory relief must overcome is convincing the trial court that such a remedy is appropriate. It has been uniformly held that even when a party has standing to bring a declaratory action, and subsequently shows that his legal interests are threatened with interference, the trial court has substantial discretion in deciding whether to grant declaratory relief. Boston Safe Deposit and Trust Co. v. Dean, 72 A.S. 393, 279 N.E. 2d 902 (1973). National Shawmut Bank of Boston v. Morey, 320 Mass. 492, 70 N.E. 2d 316 (1947). The court may consider whether a declaration of rights at the instant stage of the controversy would put an end to the entire controversy or a major part of it.

Should plaintiffs seek declaratory relief in a federal court, this policy against piecemeal adjudication will be reflected in the doctrines of comity and exhaustion of state remedies. In City of Chicopee v. Sullivan, 379 F. Supp. 569 (1974), two municipalities brought suit to have a part of the state school aid distribution formula declared unconstitutional. At the same time, they were bringing suit in state court for a money judgment representing aid that had allegedly been unlawfully denied to them. The court found that the plaintiffs had split their cause of action between state and federal courts in order to circumvent the federal court's lack of jursidiction to award money judgments against state treasuries (by the Eleventh Amendment). It was held that under those circumstances, since

the state courts could ajdudicate all of the issues in the dispute while the federal court could only consider some of them, it was proper for the federal court to decline to decide the case.

Obviously, the plaintiffs in Chicopee premised their litigation tactics on the assumption that a federal court would be more likely to declare a state statute unconstitutional than a state court would be. As we noted elsewhere in Sections I and V of this report, Massachusetts plaintiffs are increasingly turning to federal courts to adjudicate alleged deprivations of individual rights. Although there are no jurisdictional problems with a federal court awarding a money judgment against a local school district, a prayer for relief which takes the form of a levy on the state treasury is barred by the Eleventh Amendment.[3] If a separate action is being brought in state court for the financial relief, then, under Chicopee, it is proper for the federal court to decline jurisdiction under the comity doctrine.

The practical question for litigators is how long after instituting a federal declaratory action must they wait to bring suit in state courts, in order to satisfy the federal court that comity does not require a dismissal. Furthermore, what would be the res judicata effect of a declaratory decision of a federal district court or court of appeals, on a state court? That is, in a subsequent state court action for money damages, would the state court consider itself bound by a lower federal court's declaration of unconstitutionality? Should it be relevant that the litigants apparently structured their litigation to take advantage of the seeming friendliness of federal courts to federal claims, and at the same time to avoid the Eleventh Amendment obstacles to obtaining monetary relief in federal court?

D. Administrative Procedure Act

A person aggrieved by administrative action affecting school curriculum might be able to obtain judicial review under the Massachusetts Administrative Procedure Act (M.G.L.A. 30A, sec. 1, et. seq.) There are three major issues here. First, decisions of what officials are reviewable under the APA? State Board of Education decisions which otherwise satisfy the act (i.e. they are either "adjudications" or promulgations of "regulations") are definitely reviewable. However, since most curriculum decisions are made locally, the more interesting question is whether the APA applies to actions taken by school committees or under their authority. In most cases, it does not.

Secondly, all persons "aggrieved" by final agency decisions have standing under the act. However, the kind and degree of interest which must be shown for a person to be "aggrieved" seems to depend on several factors -- the case law can be reduced to no simple formula.

The third question involves the interaction of the APA with other statutes, and with other doctrines dealing with judicial review. By its own terms, the APA does not apply when a different statute makes another form of review exclusive.[4] Our question, however, is directed at the opposite question, that is, when will a court dismiss an action for review based on another jurisdictional statute because it finds that the APA is the exclusive method for obtaining review of that action? The most important situations involve declaratory actions, mandamus, and federal comity problems. We already explained in our declaratory judgment section that under Westford, the applicability of the APA is no bar to maintaining a declaratory action. The situation under the mandamus statute is otherwise, since that law requires that no other practical relief be available before a writ will issue.

Similarly, the U.S. District Court for the District of Massachusetts seems inclined towards abstaining when there appears to be an opportunity for judicial review under the APA which the plaintiffs did not try to use.

We now turn to a more detailed analysis of these issues. We have found no cases directly holding that school committee "adjudicatory proceedings" or "regulations" are reviewable under the APA. Technically, the question is whether a school committee is ever an "agency", as defined in section 1(2) of the act.

> "(2) 'Agency' includes any department, board, commission, division or authority of the state government, or subdivision of any of the foregoing, or official of the state government, authorized by law to make regulations or to conduct adjudicatory proceedings, but does not include . . . . "

It has been held that neither a municipality nor the office of a city fire commissioner qualifies. Brignoli v. City of Boston, 73 A.S.A. 426, 297 N.E. 2d 512 (1973). Nor is a city Rent Control Board--though it owes its existence to a state enabling act--a state agency under the APA. Mayo v. Boston Rent Control Administrator, 74 A.S. 1109, 314 N.E. 2d 118 (1974).

There is, however, a peculiar federal case which appears to interpret the APA as generally applicable to school committee decisions. In Flaherty v. Conners, 319 F. Supp. 1284 (1970), a suit was brought against the Boston School Committee on behalf of a retarded child, charging that he had been unlawfully suspended from special education classes. The court decided that it should abstain from deciding the suit (which involved several federal and state claims) because the plaintiff had not exhausted his state remedies.

> "[E]ven assuming the fact that the school committee refused to adhere to the procedures provided for after plaintiff had properly requested a formal hearing, then redress for plaintiff's grievances clearly seems to be provided for under the State Administrative Procedure Act, Mass. Gen. Laws, c. 30A, sec. 14, which offers appeals from administrative decisions to the state courts and, ultimately, to the Supreme Judicial Court." [emphasis added] 319 F. Supp. at 1286.

The opinion gives no authority for the proposition that the APA applies generally to the "administrative decisions" of school committees. Indeed, there is no such authority. However, the court had a fairly sound reason for finding the APA applicable to the particular school committee decision involved in Flaherty and this finding could have been supported by a more narrowly drawn interpretation of the APA. A Massachusetts statute specifically required that

> "a school comittee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him and his parent or guardian an opportunity to be heard." M.G.L.A. c. 76, sec. 17.

Apparently,the court's theory was that if such a hearing was held, it would be reviewable under the APA; and if the school committee refused to hold one then that decision would similarly be reviewable. The way this theory can be reconciled with the absence of any authority designating school committees, generally, as being "agencies" under the act, is to say that the committee must be deemed to be a state agency insofar as it had a specific statutory duty to hold an expulsion hearing. This proposition would be consistent with the theory that when school committees are acting under the authority of general statutory grants of authority, they are to be considered local entities not subject to the APA.

This theorizing illustrates the chameleon-like legal status of local public school bodies under state law. For some purposes they may be treated as plenary local governmental bodies; for others they are considered local agencies; and for others still they might be deemed state agencies. We think that this conceptual flexibility, if rationally and non-discriminatorily applied, can be beneficial. There is a constant tension between state and local control of public schools. Legislatures should be able to make fine adjustments in this system and experiment with different arrangements

without having to make drastic revisions in the basic legal framework. For example, if we assume that the legislature passed the expulsion-hearing provision involved in Flaherty because it was especially concerned with procedural regularity and with the protection of students against local abuse, then the rule which we have drawn out of Flaherty accomplishes these ends while keeping the alteration of local authority at a minimum. That is, by deeming school committees to be state agencies insofar as expulsion hearings are concerned, the court has made available to persons aggrieved by this particular class of decisions -- for which the legislature has expressed special concern -- a thorough procedure for judicial review.

On the second major issue of this section, APA standing, the root of authority is G.L. c. 30A sec. 14, which provides, in part:

> "Except so far as any provision of law expressly precludes judicial review, any person . . . aggrieved by a final decision of any agency in an adjudicatory proceeding . . . shall be entitled to a judicial review thereof . . . " [emphasis added]

The reasons most frequently given for denying standing under this section are -- the plaintiff is not "aggrieved;" even if the plaintiff is "aggrieved," review is precluded by another statute; the decision sought to be reviewed is not an "adjudicatory proceeding" (School Committee of Springfield v. Board of Education, 311 N.E. 2d 64 (1974)). Since deciding the standing issue often involves interpreting and relating both the APA and some other statutory scheme, courts can use a variety of theories for their holdings. A court might find that under a particular statute there is no express intention to preclude judicial review generally, but still find that the legislature in passing that statute did not intend for the claimant in this case to be protected any more than the public generally, and therefore he is not aggrieved and has no standing.

For example, in Shaker Community, Inc. v. State Racing Commission, 346 Mass. 213, 190 N.E. 2d 897 (1963), a person who owned land contiguous to the Hancock Raceway sought judicial review of a State Racing Commission decision awarding certain racing dates to Hancock. The Supreme Judicial Court held that the petitioner did not have enough interest in the decision to be a person aggrieved by the decision.[5] The holding was based on an interpretation of the statute establishing the commission, the court concluding that it was not the legislative purpose to give all persons with land abutting racetracks the right to obtain judicial review of Commission decisions. The Court stated, however, that in general, section 14 of the APA should not be narrowly construed, and that there could be circumstances under which a local government, the Attorney General, or others could obtain review of the Commission decisions. In other words, this was not a case of a statute which "expressly precludes judicial review."

Thus, by the analysis in Shaker, one must examine the statute under which the administrative action was taken with two thoughts in mind. Does that statute expressly preclude judicial review? Did the legislative draftsmen contemplate suits by persons such as the instant plaintiff? In light of the statement in Shaker that section 14 should not be narrowly construed, once a party has made a prima facie showing that he is a proper party, the burden of proof should be on the person who disputes that party's standing.

Even is a person is suitably aggrieved by agency action, his petition for review will be dismissed if it is untimely. The typical mistake is failure to exhaust† administrative remedies (see, e.g. Electronics Corp. v. City Council, 348 Mass. 569, 204 N.E. 2d 707 (1965); St. Luke's Hospital v. Labor Relations Commission, 320 Mass. 467, 70 N.E. 2d 10 (1946)). For example, in Worcester I.T.I. Instructors Ass'n v. Labor Relations Commission, 357 Mass. 118, 256 N.E. 2d 287 (1970), it was held that a teacher's union

petition to review a decision of the Labor Relations Commission which had ordered a representation election, was premature. The Court said that ordinarily a certification decision was not a "final decision"; the union's proper course of action was to institute an unfair labor practice proceeding. Then the entire proceeding, including certification, would be reviewable.

The third major issue in this section is the preclusion of other forms of review because of the availability of the APA action. We have just noted that an action brought in state court under the APA may be dismissed if the petitioner has not exhausted state administrative remedies. Analogously, if an action is brought in federal court, it may be dismissed under the abstention doctrine if the petitioner has failed to exhaust state administrative or judicial remedies. Thus, in Flaherty, supra, it was held that the court should abstain because they had not yet availed themselves of APA review. (However, for reasons of "judicial economics" the court, which had held a full evidentiary hearing, made findings of fact on the merits of the petitioner's claim. It said the ruling was "without prejudice" to plaintiffs' availing themselves of their administrative and state judicial remedies.)[6]

Massachusetts courts are also prone to dismiss mandamus actions brought by petitioners who would have had standing to bring APA actions. A prerequisite to issuance of a writ is a showing that no other adequate relief is available. In Cleary v. Licensing Commission of Cambridge, 345 Mass. 257, 186 N.E. 2d 815 (1962), this rule was given as the grounds for barring a mandamus petition, even though the adequacy of the supposedly available alternative remedies was very questionable.[7]

E. Extraordinary Remedies

Mandamus and certiorari are two actions that may occasionally be used to review actions of school officials. They are called "extraordinary remedies" because of the infrequency with which one can qualify to invoke them. The relatively easy availability of review by declaratory actions and the state administrative procedure act diminishes the incentive to use these writs.[8]

Mandamus[9] lies to review an alleged failure to perform a ministerial duty. The petitioner must show that he has no adequate legal remedies. As we noted in our discussion of the APA, the Supreme Judicial Court has denied the writ because there supposedly existed alternative remedies, even though said remedies were very hypothetical and probably impractical. Cleary, supra. Also, the criteria for determining when a person has standing to bring a mandamus action to redress wrongs to the public, are still unclear. In Nickols v. Commissioners of Middlesex County, 341 Mass. 13, 166 N.E. 2d 911 (1960), a group of citizens sought to prevent a county government from despoiling a pond and woodlands, allegedly in violation of a restriction in the deed under which the county acquired the lands. In that situation, the Court found:

> "The petitioners have standing as citizens by mandamus to 'enforce a public duty of interest to citizens generally.' [citations omitted]"
> 166 N.E. 2d at 916.

The certiorari action[10] can be brought to correct the decision of a tribunal inferior to the court in which the petition is made. The tribunal must have been acting in a judicial or quasi-judicial capacity. There must be no other statutory or common law remedies available. It has been held that a vote of a school committee to approve the qualifications of and to

appoint an applicant to a position in a high school was an administrative act, not reached by nor within the reach of a writ of certiorari, even though the school committee's action purported to be an application of a committee rule to a particular situation. Good v. School Committee of Cambridge, 354 Mass. 759, 236 N.E. 2d 87 (1968).

F. Scope of Review

1. State Courts

Massachusetts courts have adopted a .

> "philosophy of granting administrators quite wide discretion, electing not to interfere with the administrative process unless clear illegality or prejudice to a party can be shown."
> Cowin, 13 Annual Survey of Massachusetts Law 175.

There is probably no stronger manifestation of this deferential attitude than in decisions reviewing school committee actions. See e.g. Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965). We reserve our main discussion of the school committee cases for Section V, on local districts, since the rule of deference is one of the cornerstones of Massachusetts-style decentralization.

The most important, explicit rule on scope of review is APA, section 14(8). It states that the court may grant relief if it is found that the agency decision is:

(a) In violation of constitutional provisions; or
(b) In excess of the statutory authority or jurisdiction of the agency; or
(c) Based upon an error of law; or
(d) Made upon unlawful procedure; or
(e) Unsupported by substantial evidence; or
(f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (7) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or
(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

* * *

> The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. [emphasis added]
>
> The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it."

The most commonly referred to standard is that the court will uphold any decision based on substantial evidence in the whole record. The court must not substitute its judgment for that of the agency, if a reasonable person could have arrived at the agency's decision after considering the evidence."

Even in cases where the APA standards are not directly applicable, the court's review is usually imbued with these concepts. One example of this is judicial review of school committee decisions in declaratory actions or mandamus actions. Another example is review of State Board of Education decisions pursuant to the 1965 Racial Imbalance Act. The Act contains its own standards for judicial review, which are actually a summary statement of the APA provisions quoted above.[12] Thus, when the courts were called upon to review a Board decision which approved a plan for complying with the racial imbalance laws in the city of Springfield, it was held that the question for decision was not whether the court believed the plan met safety and neighborhood requirements, but whether there was substantial evidence before the Board to support its conclusion that these requisites were satisfied. School Committee of Springfield v. Board of Education, 311 N.E. 2d 69 (1974).

It should be noted that a court's aggressiveness vis-a-vis an agency may be greatly influenced by whether the grounds for challenging the agency action is one of those enumerated in subsections a-d (of sec. 14(8)), or one of those named subsections in e-g. The first four grounds involve predominantly legal issues, where the court's competence is ordinarily superior

to that of the agency's,[13] and it would therefore be proper to substitute the court's legal judgment for the agency's. The doctrine of deference has grown out of the more frequently litigated question of the lawfulness of agency fact-finding under the last three grounds.

Another variable in scope of review is the extent to which courts develop the record on which their decisions are based. To begin with, when a decision is purportedly based on an agency hearing, the court must, upon the petitioner's request, order the agency to file the record of the hearing. City of Lawrence v. State Board of Education, 357 Mass. 200, 257 N.E. 2d 461 (1970). Some statutory schemes provide for de novo court review. In the education context, a tenured teacher who has been discharged by a school committee has a right to a de novo adjudication in superior court.[14] So far as APA cases are concerned, the taking of additional evidence is governed by section 14(7). This provision gives the court substantial discretion for the introduction of new evidence. The agency, not the court, actually takes the evidence.[15]

2. Federal Courts

a.) Abstention

One dimension of federal court review of the actions of school officials, is that a federal district court might abstain from deciding a case that presents both federal and state law claims. Abstention is a judicially created doctrine which allows for the exercise of relatively wide discretion by the district court, provided the court applies the criteria of the Pullman doctrine.[16] Also, it was affirmed in England v. Louisiana Medical Examiners, 375 U.S. 411 (1964), that one has a right to have federal claims adjudicated in a federal forum. Consequently, a federal court which abstains also retains jurisdiction pending the outcome of a substituted state court suit brought

by the plaintiff. If the plaintiff states in the record of the state court proceeding that he reserves his right to have his federal claims decided by a federal court, then if he loses on his state claims he can return to the federal court which originally abstained for a hearing on his federal claims.

The First Circuit has held that abstention is appropriate when there are no state cases to guide the federal court on state law, or when the chances are good that a state court interpretation of state law will obviate decision of the federal question in the case.[17] It is relevant to this determination that there is a pending state court proceeding where there is a substantial possibility that relief will be granted. Steele v. Haley, 451 F. 2d 1105 (1st Cir. 1971).) On the other hand, abstention is not appropriate when the only possible grounds for granting the relief requested would be constitutional[18] or where a state court interpretation could not dispose of the basic constitutional claim.[19]

The ultimate right to a hearing in federal court was noted recently in a school context in Drown v. Portsmouth School District, 451 F. 2d 1106 (1st Cir. 1971), "Drown II". Ms. Drown was a nontenured school teacher who was discharged, allegedly for the reason that her superiors disliked her innovative and unconventional teaching methods. School officials stated that Ms. Drown was "uncooperative, disregarding schedules and not accepting direction." After finding that the dismissal was in compliance with state law, the court went on to consider whether the dismissal violated plaintiff's due process rights.

> "[T]he board's [reasons] for dismissal stand unshaken, and the district court properly dismissed the complaint.
>
> In so holding, we nonetheless recognize that where a teacher makes a plausible claim that her collateral constitutional rights have been violated, she is entitled to a hearing in federal court despite the existence of another and otherwise nonarbitrary reason." 451 F. 2d at 1109.

In another teacher dismissal case, Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974), it was stated that a federal court should not abstain, even if the decision of a federal question could be avoided by a state court's narrowing of the meaning of a state law that is alleged to be unconstitutionally vague, when the highest state court had been presented with an opportunity to make such an interpretation but had failed to do so.

b.) Standards of review in federal courts

This is not the place to go into a wide-ranging review of all of the constitutional doctrines which could be used to challenge the actions of school officials. However, we think it useful to note the procedural due process standards with which decision-making by Massachusetts school officials must comply.

In Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970), "Drown I", it was held that even a nontenured teacher has so substantial an interest in her nonretention that a school board must provide a written explanation, with some detail, of the reasons for nonretention, and must provide access to evaluation reports in the teacher's personnel file. After Drown I, the Portsmouth (New Hampshire) board supplied the plaintiff with reasons for dismissal, and the plaintiff appealed to the federal courts on the grounds that to fire her for those reasons was arbitrary and capricious.

In Drown II, the First Circuit articulated the due process standards of review,[21] as follows:

> "(A) reason may be arbitrary or capricious in any of three ways. Even in view of the broad scope of a school board's discretion, a reason may be unrelated to the educational process or to working relationships within the educational institution. . . .
>
> Or a reason may be arbitrary in that it is trivial . . .
>
> Finally, a reason may be aribtrary or capricious in that it is wholly unsupported by a basis in uncontested fact either in the statement of reasons itself or in the teacher's file." 451 F. 2d at 1108.

Under this standard, the court held that the dismissal of Ms. Drown was not arbitrary and capricious. Ms. Drown admitted that members of her department found her uncooperative because of her choice of curriculum and classroom procedures, but she claimed that was not a valid reason for dismissal. The court disagreed:

> "[N]on-re ewal of a teacher for being 'too innovative and unconventional' would be proper under the wide discretion accorded the school board [citing Drown I], even if a court or another board would think it wiser to have innovative but 'uncooperative' teachers rather than bland but 'cooperative' ones." 451 F. 2d at 1109.

Curiously, the court noted that the plaintiff had not made any claim on the First Amendment. That appears to be a hint that the court would have been willing to find that some kinds of innovative teaching can be constitutionally protected speech.

Drown involved federal court review of a school board's dismissal of a teacher for clearly job-related conduct. It was not arbitrary or capricious, the court found, to fire a teacher whose innovative teaching efforts caused staff friction. Wishart v. McDonald, 500 F. 2d 1110 (1st Cir. 1974), added an issue that was not in Drown -- what kind of out-of-school behavior by a teacher could rationally be considered grounds for dismissal because of its potential threat to in-school operations.

The plaintiff teacher's principal had rated him an excellent teacher about the time when plaintiff began to engage in unusual activities outside his home. On several occasions he played with a mannequin in his yard, dressing and undressing it in women's clothes and touching it lewdly. Wishart's psychiatrist gave uncontradicted testimony that Wishart had a personality disorder, but stated that it should have no effect on his classroom performance (as indeed it had not so far). The Superintendent viewed this behavior one night himself, and concluded that it called for Wishart's

dismissal. The District Court, on review, ruled that the firing decision was sufficiently rational to be upheld, and the Court of Appeals affirmed. The District Court indicated, however, that the Superintendent's decision was on the borderline of acceptability under due process standards.

> "[T]here was a basis, if somewhat meager, for McDonald's belief that the conduct had, or certainly would in the future, gain a degree of notoriety which would damage plaintiff's effectiveness as a teacher in the school system and his working relationships within the educational process. It cannot be said that the school committee acted arbitrarily or capriciously in sharing in that opinion . . . [emphasis added] 367 F. Supp. at 535, quoted approvingly in 500 F. 2d at 1113.

The court emphasized that although Wishart's objectionable behavior took place on his property or at it edge, he had conducted himself in a way that he knew or should have known that he would be observed and become a matter of public knowledge. Given the court's muted skepticism about the cogency of the Superintendent's judgment, this may have been the deciding factor. The casting aside of privacy has also seemed to be a deciding factor in cases in two other jurisdictions, Acanfora v. Board of Education, 491 F. 2d 498 (4th Cir. 1974); Pettit v. State Board of Education, 10 Cal. 3d 29, 513 P. 2d 889 (1973); Moser v. State Board of Education, 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972).[22]

In these few situations where the federal courts have reviewed school officials' actions under the Due Process Clause, although local school decisions have not nearly attained the untouchable status they have generally enjoyed in the state courts, the results have lined up generally in favor of school board defendants. One should not forget, however, the sharp contrast between the First Circuit's striking down of a grooming regulation in Richards v. Thurnston, 424 F. 2d 1281 (1970) and the sustaining of a substantially similar rule by the Supreme Judicial Court in Leonard v. School

Committee of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965). The "hint" about possible First Amendment liability rights which we noted in Drown, plus the decision of Richards on substantive due process grounds, indicate that the courts of the First Circuit will be more demanding in their review of school officials under those theories than under general due process for arbitrary and capricious actions.

V. Local Districts

1. School Committees

The school committee is the locus of curriculum-making authority. As we have seen, the powers of the Board and Department are very limited. (They have taken the initiative in some areas where they have been given specific statutory duties, e.g. racial balancing, special education.) It is up to the school committee to flesh out the legislature's general curriculum directives. Other local actors — administrators, teachers, parents, unions, students -- enjoy specified rights which may sometimes block or redirect school committee curriculum policies. For example, under certain circumstances the Massachusetts Labor Relations Commission, a court, or an arbitrator[1] can overrule a committee decision; a group of twenty parents, or five percent of the student body, can initiate a high school course which the school committee would not otherwise have offered.[2] But while it may be stymied in particulars of execution, the school committee's curriculum policy-making position is supreme.

The committee's authority to prescribe curriculum policy is matched by its degree of fiscal autonomy. When the committee adopts a budget of expenditures "necessary" for local education, the municipality is required by law to appropriate the budgeted funds and levy whatever taxes are needed to raise the money.[3] If the municipality balks at this, a court may not only order compliance, but may also fine the municipality in an amount equalling 25% of the deficiency in appropriations, the fine to be turned over to the school committee for educational purposes. (Boston municipal and school affairs are governed by special laws, and financing is one of the areas where these enactments depart from the general laws. The main differences are noted in the margin.[4]) The state's policy of school committee financial autonomy

was renewed recently in the passage of the public employees collective bargaining law. In the case of any public employer except a school committee, when it has reached agreement with its employees, that agreement does not become final until the contract has been submitted to the proper legislative body and that body has appropriated funds to implement the terms of the agreement.[5]

Despite its dominant position, the Massachusetts school committee has not escaped national trends that are affecting local school officials everywhere. The Special Education Act and the Transitional Bi-Lingual Education Act have forced school committees to give high priority to educational services that they would not have provided, if left to themselves, or would have offered in terms different from those mandated by statute and state regulation. The Racial Imbalance Act, and, in Boston, federal court orders, have also substituted state and national standards for local policies of pupil assignment. The federal courts have applied much more demanding standards of rationality and respect for constitutionally protected conduct in suits against school committees than state courts had been willing to establish and enforce. In 1970 the First Circuit ruled that the expulsion of a student pursuant to a grooming regulation violated his constitutional rights; in an almost identical case five years previously, the Supreme Judicial Court had upheld a school committee's action.[6] One can also contrast a Supreme Judicial Court holding in 1970, that a probationary teacher had no constitutional right to a hearing before being dismissed, with a First Circuit's decision in the same year, which also said that no hearing was needed, but did find a due process right to a written statement, in some detail, of the reasons for the firing.[7] The federal courts have also been more receptive to free speech claims against school officials than have state courts.[8]

The premises of school committee supremacy have been eroding. In a small, homogeneous, nineteenth century community, the elected school committee had the legitimacy and resources to perform with substantial fairness and efficiency the function of providing educational services. The model doesn't hold up as well when individual rights to speech, liberty, privacy, and procedurally fair treatment, have expanded greatly in scope. The growth of cities has reduced the intimacy of participation in school committee decision-making. In Boston, for example, the school committee has been intransigent and hostile towards the expressed interests of a substantial minority of its constituents.[9]

On the other hand, the broad authority of the school committees over curriculum provides the flexibility that is necessary for educational innovation. The possibilities for locally initiated experiments with new school governing structures, new teaching methods and materials, are virtually limitless. The committee only needs the energy and determination to tackle the practical problems of innovation, and to stay within the boundaries of delegation doctrine, equal protection requirements, state financing requirements and the like. An important factor which varies from community to community is the extent to which collective bargaining agreements reduce committee prerogatives. For example, the proposed salary scale and teacher selection and dismissal procedures for a public alternative school might conflict with terms in a contract with the local teachers union. Or, at the least, the committee has a statutory duty to meet and consult with the union about "any" terms and conditions of employment, and to negotiate in good faith.[10] The union might take such an opportunity to take a hard line on any aspects of the experiment that threatened its interests. We know of cases outside Massachusetts in which union demands have destroyed the financial viability of experimental schools, or eliminated provisions in

their charters which were central to their objectives. Of course, teacher unions may use their prerogatives to urge school committees to initiate new, quality programs that it would not otherwise have attempted. Our initial mention of negative examples is due to the context here, i.e. a discussion of school committee authority.

In the balance of this section we set out the basic statutory framework for school committee authority. Then we examine the state decision law under these statutes, to show that the unifying principle for these cases once was--the school committee can do no wrong.

A. Statutory Framework

To some extent, the constitution and powers of a school committee may depend on the kind of city charter under which its municipality is operating. The most extreme set of variations is found in the Boston city charter, which is discussed supra, at 80 , n 4 . The basic authorizing section is M.G.L.A. c. 71, §37:

> "It [the school committee] shall have general charge of all the public schools, including the evening schools and high schools, and of vocational schools and departments when not otherwise provided for."

The form of election of committee members and the committee's procedures are subject to prescription by either city charter or internal school committee action, the options available in any particular case depending on the form of municipal government. For example, in cities with letter forms of government, A, B, C, D, E, and F, it is specificially provided,

> "The school committee shall consist of the mayor, who shall be the chairman, and six members elected at large." M.G.L.A. c. 43, §31.

It is also provided that the school committees of cities with those charters,

> "shall make all reasonable rules and regulations, consistent with law, for the management of the public

> schools of the city and for conducting the business of the committee." M.G.L.A. c. 43, §33.

Aside from the few statutory curriculum mandates discussed in Section II, there are few other provisions dealing directly with curriculum. Most of the statutory law on school district authority deals with management of finances, relationships between school districts and other public bodies, and the rights of professional employees. As we have noted earlier in this chapter, Massachusetts has a permissive presumption in favor of school committee authority. Thus, committees can formulate and implement curriculum policy in any manner which does not contradict and is not inconsistent with state law or policy.

B. The Massachusetts Tradition of School Committee Supremacy[11]

Massachusetts decisional law bearing on disputes over the education of children has been shaped by the tension between two fundamental doctrines. The Constitution of the Commonwealth of Massachusetts, Chapter V, Section II, states, in part:

> "(I)t shall be the duty of the legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences...; especially the university at Cambridge, public schools and grammar schools in the towns..."

But the state's obligation to foster quality public education had to be balanced against the equally cherished values of individualism and local democracy.

> "The eminence of the Massachusetts Supreme Judicial Court...is in large measure due to its...understanding of the durable values long prized in this community... Here abides the ancient faith in the right of men to choose their own associates, make their own arrangements, govern themselves and thus grow in responsibility without much in the way of either hindrance or help from the state."[12]

Early in its history, the Court concluded that the local school committee was the institution primarily entrusted with balancing the educational interests of individuals and the state. The result was a virtual sanctification of committee actions. Any decision having the slightest connection to educational policy, became immune to judicial review. The aggrieved citizen was left to seek a remedy through the local political process.

The case law basis of school committee authority is examined below. Section (1) describes the power of school committees vis-a-vis individual parents and pupils. The prerogatives of committees in dealings with municipal officials are analyzed in (2).

(1). Telling kids where to go: expulsion and compulsory attendance

School committees have been able to expel pupils for any "educational" purpose, unless it could be proved that they had acted in bad faith. The Supreme Judicial Court has upheld expulsions for tardiness, for minor acts of misbehavior, for failing to salute the flag, for refusing (on a doctor's advice) to be vaccinated against smallpox, for having a reputation of unchastity, and for wearing long hair.[13] Because of statutory changes[14] and subsequent federal constitutional rulings, school committees would lose these cases today. But as recently as 1965, in George Leonard v. School Committee of Attleboro[15] the Court specifically affirmed the principle of school committee discretion on which this body of cases rests.

High school officials had expelled George Leonard, "a conscientious, well behaved, and properly dressed student." George was an accomplished professional musician, whose "image as a performer [was] in part based on his hair style." This style, however, was said to violate a school regulation against "extreme haircuts."

The Court acknowledged the gravity of expulsion.

> "Few rights are of more importance to our youth than the right to attend our public schools." [16]

But it said that this right was outweighted by the Massachusetts tradition of school committee discretion, and cited several cases decided between 1839 and 1934, in support of that point. George had also asserted constitutional claims. The Court disposed of them in one sentence.

> "The constitutional points suggested in the plaintiff's brief require no discussion." [17]

Five years later, the First Circuit rejected that conclusion in Richards v. Thurston,[18] a case "containing similar facts." The federal court strictly scrutinized assertion by officials of discretion in an area of educational policy.

> "(S)uch compelled conformity to conventional standards of appearance (does not) seem a justifiable part of the educational process." [19]

In the absence of a legitimate state purpose, the Fourteenth Amendment protected "such uniquely personal aspects of one's life as the length of one's hair."

Leonard did not reach the question whether an expulsion which was justified as a discretionary school committee action ended the state's educational obligations to the student.

The Attorney General spoke to that point in 1938.[20] A school committee had inquired whether it could expel a pupil who would not salute the flag. The Attorney General replied that it was an "appropriate disciplinary measure". He added, however, that the expulsion would not terminate the responsibility of a child's parents to comply with compulsory attendance laws. If they could not afford private school tuition, he reasoned, then it would be the duty of the Commonwealth to see that educational facilities

were furnished. Thus, he implied that localities have a lesser obligation than the state to provide educational services. In the exercise of their discretionary powers they could contravene the policy of the commonwealth by excluding a student for reasons insufficient to terminate the state's duty to him. As legal entities, municipal governments and local boards are creatures of the state; the Attorney General's flag salute opinion demonstrated that under Massachusetts school law, the tail may wag the dog.

In some ways, a school committee's discretion to compel school attendance is even broader than the expulsion power. The compulsory attendance law requires:

> "Every child...shall...attend a public day school ...or some other day school approved by the school committee, during the entire time the public schools are in session...; but such attendance shall not be required...of a child who is being otherwise instructed in a manner approved in advance by the superintendent of the school committee...For the purposes of this section, school committees shall approve a private school only...when satisfied that such instruction equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town..."[21]
> [emphasis added]

Although it looks like attendance laws in most other states, in the Massachusetts context this statute gives local officials an unusual degree of control over students and parents.[22]

There are three sources of this power, and they have cumulative effect. First, are the "approved" clauses. There is no uniform state standard for measuring the quality of private instruction. Thus, local authorities are entrusted with three judgments -- evaluation of the local school program; evaluation of the alternative program; comparison of the two. Furthermore, a parent wishing to utilize a program not already examined and approved by the committee must wait for advance approval. If the committee rejects the

plans for a new school or for a course of home instruction, that program will never have a chance to prove itself in operation -- unless, that is, parents are willing to risk prosecution and certain conviction.[23]

The parent is further hemmed in by the absence of any channel for administrative relief. Unlike many other states, such as New York,[24] Massachusetts education law does not have a general procedure for appealing the decisions of local authorities to state officials. Even if there were some form of appeal, it is hard to imagine the committee or superintendent being reversed, since they would have to be treated as experts in their judging of the quality of their own schools, the standard they are told to apply to the alternative program.

The last nail in the procedural coffin is foreclosure of effective judicial review. In Commonwealth v. Renfrew,[25] parents prosecuted under this statute pleaded as an affirmative defense that they had given their child substantially equivalent instruction to that available in the public schools. In most states, they would have had the opportunity to prove their contention.[26] Not in Massachusetts. They were charged with failure to obtain advance approval; showing that their child received excellent instruction was not relevant to their guilt or innocence. There was no way for the parents to put the substance of their dispute with the committee before a judge or jury. The Attorney General is in accord with this analysis:

> "(Renfrew) has withdrawn from the parent all discretion to raise his child without a public education or one approved by the school committee."[27]

(2). Fiscal autonomy of local school committees

In Edwin Leonard v. School Committee of Springfield,[28] the city's mayor and several of its taxpayers sought to enjoin the school committee

from using moneys appropriated for summer schools, kindergartens, and other budget items, to supplement the funds appropriated for teachers' salaries. The Municipal Indebtedness Act of 1913 prohibited any department of a city from incurring liabilities in excess of the appropriations approved by the mayor and city council for any item. The mayor had rejected salary increases recommended by the committee, but the school officials carried through their recommendation anyway, with the help of money taken from the other budget items.

The Court held that the Indebtedness Act did not apply to a school committee intermingling funds to further educational policies. In this case, the committee's obligation to select and contract with teachers carried with it the implied authority to fix their compensation. En route to this conclusion, the Court reviewed the fundamental sources of school committee authority:

> "The policy of the Commonwealth from early times has been to establish a board elected directly by the people separate from other governing boards of the several municipalities and to place the control of the public schools within the jurisdiction of that body unhampered as to the details of administration and not subject to review by any other board or tribunal as to acts performed in good faith." [emphasis added] 29

The holding of Edwin Leonard is echoed in several Massachusetts statutes which exempt school officials from centralized purchasing and accounting requirements.[30] School committees, for example, are the final judges of the quality of instructional materials. Their choices cannot be overruled by a state or municipal purchasing agent, and they may -- for quality reasons -- accept a competitive contract bid which is not the lowest one. On the other hand, the school committee is treated like other departments when contracts

are "of a commercial nature as distinct from those traditionally under... control of the school committee."[31]

The general principles stated in Edwin Lecnard, however, need to be qualified. As noted by the Court at the end of its opinion, the Springfield School Committee did not try to spend more than the total appropriations for school purposes. Thus, there was no analysis of the power of a school committee, relative to other governmental agencies and to taxpayers, to decide how much to spend for the public schools.

The answers to such questions are derived from the interaction of statutory and case law, and fiscal practice. State law provided that

> "Every city and town shall annually provide an amount of money sufficient for the support of the public schools as required by this chapter."[32]
> [emphasis added]

Upon petition by appropriate parties,[33] a superior court judge can determine whether there is a deficiency, and may order city officials to provide a sum equal to the deficiency plus twenty-five per cent of it.

The trick is applying the term, "sufficient." Some provisions in the chapter mandate programs that would be easily missed if not funded. But as to optional school services, and the many gradations of quality within the mandated ones, the Supreme Judicial Court has consistently held that "sufficient" is what a school committee says it is. When the city council of Brockton cut the school budget, petitioning citizens succeeded in having the funds restored.

> "All subjects taught in the public schools of Brockton are required to be taught therein by G.L. (Ter. Ed.) c. 71, or are subjects that the school committee deems expedient to have taught. The city is not exempted... from maintaining a high school... The superintendent... and all teachers...were serving...in accordance with G.L. (Ter. Ed.) c. 71, secs. 38, 41, and 59. All other employees...are under civil service.

* * *

> "(The laws) give the school committee the sole and absolute right to fix the salaries of those teachers."[34]
> [emphasis added]

The Court decided that it could not look closely at the committee's estimates, because in order to preserve its constitutionality, the deficiency statute must be seen:

> "not as an attempt to confer upon the courts any executive or legislative power to determine the reasonableness of any such estimate, but only as providing the means of compelling appropriations in accordance wherewith."[35]

In Day v. City of Newton,[36] the Court compelled the city to appropriate $1,100 the committee had budgeted for three of its members to attend a convention of the National School Boards Association in San Francisco.

> "Within a wide limit 'necessary' means reasonably deemed by the committee to bear a relation to its statutory mandate."[37]
> [emphasis added]

In a dictum, it was suggested that the appropriating body could only exclude "patently illegal items."[38]

In Carroll v. City of Malden, 320 N.E. 2d 843 (Mass. App. 1974), a ten-taxpayers suit was brought under §34 to compel the city to appropriate $7,000 that had been budgeted by the school committee for a feasibility study of a community schools program. The Court said that since loan of school facilities for the use of community school programs, and the partial funding of such projects in the school committee budget, was provided for in M.G.L.A. c. 71, §71, the committee must have the implied authority to expend money to study possible involvement with such programs. The Court was applying the Day formula of finding a relationship between the expenditure, and the committee's statutory mandate.

The Carroll opinion included a brief historical summary of the relationship between the policy-making and fiscal aspects of school cimmittee autonomy.

The passage is worth quoting, both for the information it contains, and as a demonstration of continuing judicial regard for school committee autonomy well after the post-1965 legislative activism in local school affairs.

> "Prior to St. 1826, c. 143, §5, which inaugurated the school committee system, the duty to appropriate money for public schools and to make educational policy at the local level was lodged in the town meeting. With the advent of the school committee system, the duty to appropriate remained in the town meeting but the right to make educational policy gradually shifted to the school committee. In the ensuing century and a half, a strong tradition of school committee autonomy has developed supported by judicial decision. [citations omitted] G.L. c. 71, §34, implicitly recognizes that the committee's autonomy in matters pertinent to the management of public schools can be preserved only if the local legislative body is barred from exercising financial veto power." 320 N.E. 2d at 846-7.

Pronouncements of school committee autonomy are always made in the context of disputes between the committees and other local actors — although there is much tradition, there is no authority to stand in the way of legislative modification of school committee prerogatives. That is, school committees have no inherent authority analogous to the state constitutional powers of Massachusetts cities with home rule charters. However, because of the tradition of local autonomy, the courts usually give the committees the benefit of any doubt, in construing legislative intent. School committees are primarily to be held accountable to their constituencies through the political process.

> "The standard remedy against an extravagent or otherwise misguided school committee is simply to turn the members out of office as their terms expire." Bell v. North Reading, 1973 Mass. Adv. Sh. 679, 684, 295 N.E. 2d 894, 898 (1973).

2. Superintendents, Principals, Supervisors

These administrative personnel have an important role in shaping curriculum, because school committees rely on them for developing policy alternatives and executing policies. However, they do not have legally protected roles as curriculum makers except indirectly — through job security rights that can make them difficult to get rid of even if they do not please the school committee in all respects.

The main features of the job rights of these personnel are the following.[39] Principals and other supervisors become tenured after three years of service. Once tenured, they can only be dismissed for "inefficiency, incapacity, unbecoming conduct, insubordination or other good cause." There is a right to notice and hearing on the charges, and to a trial de novo in superior court. A superintendent cannot attain tenure by operation of law. However, a superintendent employed under a contract has, during the time of his contract, the same procedural rights as the tenured employees.

3. Teachers

Teachers have no affirmatively stated legal authority to shape curriculum. They are, however, more intimately involved with executing curriculum than any other persons in the school system. Their job security rights indirectly create a sphere of protected conduct. They can follow their best judgment up to the point where their actions would be legal grounds for sanctions against them.

Teachers also can be protected by individually or collectively bargained contracts. Moreover some of their actions may be immune from control by constitutionally protected free-speech or personal liberty.

The procedural rights of teachers are contained in M.G.L.A. c. 71, §§41 et seq. The legislature has repeatedly amended these sections to make them current with court decisions interpreting the Due Process Clause. For example, in 1970 the First Circuit held that a non-tenured teacher who was up for dismissal had a right to a written statement of reasons for the proposed action. In 1972, the legislature amended c. 71, §42, to give a non-tenured teacher (who has been on the job at least ninety days) the right to fifteen days advance notice before a motion for her dismissal can be acted on. Upon request, she is entitled to a written statement of reasons, and a full-dress hearing. The tenured teacher must be given thirty days notice of a motion for dismissal, and the committee can only dismiss the person employed at discretion for "inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause." The dismissal of any teacher or superintendent, regardless of tenure or the existence of a contract, must be by a two-thirds vote of the school committee. There are separate procedural rights in the case of suspension, and others still pertaining to salary reductions, de novo appeals, and re-imbursement of litigation costs to persons who successfully overturn their dismissals.[40]

The main issue that remains open to judicial decision is what kinds of teacher conduct are job-related, and/or constitutionally protected. A probationary teacher cannot be fired for conduct which is not job-related, because such action is arbitrary and capricious; a tenured teacher cannot be fired on those grounds for the additional reason that such a dismissal violates the good cause clause of §42. The standards are not necessarily co-extensive -- the courts might decide that there are grounds for dismissal which are not arbitrary and capricious but which nevertheless fail to satisfy the statutory standard of good cause.

There are not, as yet, many cases in point. Wishart v. McDonald, 500 F. 2d 1110 (1st Cir. 1974) involved the dismissal of a tenured teacher after he began to engage in abnormal behavior outside his home. (Case discussed supra, at 76-79) It was held that the statutory standard, "conduct unbecoming a teacher" was not unconstitutionally vague. The Court found that the dismissal was valid, although just barely so. In Drown II (Drown v. Portsmouth School District, 451 F. 2d 1106 (1st Cir. 1971), it was held that a non-tenured teacher's dismissal on the grounds that her innovative teacher methods caused friction in the staff, was nor arbitrary and capricious. It would be interesting to see if the Court would have found that the same set of facts satisfied the statutory standard in the good cause provision.[41]

At the end of its opinion in Drown II, the First Circuit hinted that if a First Amendment claim had been pleaded it might have viewed the matter differently. The First Circuit and the Massachusetts District Court for the District of Massachusetts have been cagey on this First Amendment question for some time. In the two years prior to Drown II, four cases were decided which presented First Amendment issues, but which were decided on due process grounds (with the exception of Keefe, infra, which rested on both grounds). The decisions we refer to are:

Keefe v. Geanako, 418 F. 2d 359 (1st Cir. 1969).

(teacher makes optional assignment to read article by Robert J. Lifton which includes analysis of psychological implications of use of term "motherfucker")

Mailloux v. Kiley

Kiley I -- 323 F. Supp. 1387 (D. Mass. 1971)

Kiley II -- 436 F. 2d 565 (1st Cir. 1971)

Kiley III -- 448 F. 2d 1242 (1st Cir. 1971)

(In discussion of social mores in the use of language, teacher chalks "fuck" on blackboard.)

Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969).

(teacher dismissed because he did not shave off beard as requested by superintendent and school committee)

Dunham v. Crosby, 435 F. 2d 1177 (1st Cir. 1970)

(appeal from D. Maine).

(English teacher list of themes for interpretating Romeo and Juliet included speculation about influence of sex drives.)

The cases do not tell us what a teacher may discuss in class, and how much freedom he must have in choosing his appearance, when school officials pass explicit rules (e.g. banning beards, prohibiting the use of some words and discussion of some topics), and accord the teacher all appropriate procedural safeguards in the process of dismissing him.

> "At present we see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech. Here, however, in weighing the findings below we confess that we are not of one mind as to whether plaintiff's conduct fell within the protection of the First Amendment." Kiley III, at 1243.

The fullest analysis of what constituted protected speech by a teacher was in Keefe. There, the analysis of the facts stressed a) the serious content of the disputed article --

> "We need no supporting affidavits to find it scholarly, thoughtful and thought-provoking." at 361.

and b) the socially acceptable "message" of the passages including the controversial language --

> "If it raised the concept of incest, it was not to suggest it, but to condemn it." at 361.

and c) the maturity of the audience --

> "If the answer were that the students [high school seniors] must be protected from such exposure, [to quotation of a dirty word for educational purposed] we would fear for their future." at 361.

In its analysis of the interests at stake, the court turned its back to parents who thought the use of the term in school shocking:

> "With the greatest of respect to such parents [who are, in good faith, offended] their sensibilities are not the full measure of what is proper education." at 362.

While accepting the conclusion of the district court in Parker v. Board of Education, 237 F. Supp. 222 (D. Md. 1965), later history omitted, that

> "some measure of public regulation of classroom speech is inherent in every provision of public education,"

it distinguished the holding of that case on its facts, and insisted that permitting regulation of the kind of speech involved in the instant case would

> "[demean] any proper concept of education. The general chilling effect of permitting such rigorous censorship is even more serious." at 362.

4 Teacher Unions

To what extent can teacher unions exert control over curriculum? There are three kinds of rules which bear on this question. One must consider the right of school committees to contract with teachers; the right of teachers to collectively bargain with their employers, (and the correlative duty of the committees); and the state constitutional limitations on delegation of legislative powers, which could be a barrier to arrangements otherwise agreeable to the committees and unions.

The school committees have, historically, enjoyed considerable discretion in their dealings with employees.

> "The power of school committees to 'contract with the teachers of the public schools' and to engage in collective bargaining for the purpose of setting 'wages, hours, and other conditions of employment' is fixed by statute.[42] The complete and exclusive nature

> of the authority to contract has been long established in our case law. [citations omitted]" Fitchburg Teachers Ass'n v. School Comm. of Fitchburg, 271 N.E. 2d 646 (1971). [emphasis added]

The bargaining rights of teachers are rooted in M.G.L.A. c. 150E[43] which also contains the crucial, ambiguous term: "other terms and conditions of employment."[44] Section 8 of the Act authorized the parties to include a binding arbitration clause in a collectively bargained contract.

The stage is set for a variety of disputes. For example, union representatives may put curriculum-related topics on the negotiating table under Section 6, saying they are terms or conditions of employment, and the committee may refuse to negotiate, denying that they are mandatory subjects of bargaining. When these disputes arise, will the courts (or the Massachusetts Labor Commission) give the committees any significant discretion to decide what items are mandatory topics of negotiations, and which are not? On the one hand, there is the apparent intention of the legislature to pre-empt the field of labor relations in the public sector with this act, which would lead one to think that statewide uniformity on the definition of terms and conditions of employment would be called for. On the other hand, the school committees have traditionally been given deference in their construction of statutory standards. (For example, the provision in c. 71, §34, that municipalities appropriate funds to cover all expenses the school committee considers "necessary" for the maintenance of public schools. See supra, at 90.) Our thinking is that this tradition will give way to the interest of statewide uniformity. However, even that solution leaves open the question of which

> potential bargaining issues arguably affecting employment conditions

of teachers are not covered by the phrase "terms and conditions", because they are too closely tied to curriculum policy-making. (Some issues that can arise are: class size, teaching materials, faculty-intitated courses, guidelines for experimental schools, student classification and placement.)

Turning to another problem, a mutually agreeable contractual arrangement may violate the Separation of Powers article of the Massachusetts constitution. We noted in our discussion of constitutional delegation doctrine, supra, at 4-15, that the Massachusetts courts have been especially concerned with the involvement of any "core" legislative function, and with the forms of accountability in any particular delegation of authority. An especially difficult problem would be raised by a conflict between a collective bargaining agreement setting a course of study in a high school, and a parent- or student-initiated demand for a course (pursuant to c. 71, §13). The first question would be the constitutionality of the three delegations -- to teachers, to parents, to students. Secondly, assuming all constitutional obstacles were cleared, would the contract or would the parent/student petitions prevail?

5. Parents

Since 1970, the legislature has been turning parents into a force to be reckoned with in the area of curriculum control. We have already mentioned Dr. Bongiovanni's remark, in discussing his part in the formulation of draft minimum curriculum standards in 1969, that he did not really consider specially seeking out parent and student viewpoints at that time, but that if he had the job to do over again in 1974 he would have automatically included parents and students among the groups whose opinions were to be sounded. The most important laws that have increased parental authority

are the provisions for advisory councils, for Office of Children councils, for due process procedures regarding student classification in the Special Education Act, and for parent-initiated high school courses. These enactments signified the erosion of the former legislative premise that parents exercised sufficient control over curriculum through their participation in school committee politics.

The legislature's current penchant for creating advisory boards was noted supra, at 28. Especially important is M.G.L.A. c. 15 sec. 16 , which provides in part,

> "The board shall appoint advisory committees in the areas of vocational education and special education, and may appoint advisory committees for each of its divisions and for each other curriculum area."

Also, the Office of Children, with its local councils and statewide advisory council was designed,

> "to assure parents a decisive role in the planning, operation, and evaluation of programs which aid families in the care of children." c. 28A, sec. 1(2)

In 1975, the legislature passed a local option law authorizing the formation of sex education advisory committees. Since school committees almost surely had authority to create advisory committees on curriculum matters before this statute was passed, the enactment is mainly effective as a preemption. That is, henceforth any district which wants to have a sex education advisory committee must adopt the statutorily mandated institutional form for that body. This provision reserves a majority of the seats on the committee for parents of local school children. The full text of the provision is as follows (M.G.L.A. c. 71, sec. 38(O), added by Acts 1975, c. 371):

> "In any city, town or regional school district which accepts this section, the school committee shall meet at least once every other month with an advisory committee which shall advise said school committee concerning reading, visual aid and all other material pertaining to sex education. Said committee shall consist of eleven members, one of whom shall be a physician and seven of whom shall be parents of children attending a school of such city, town or regional school district. The school committee in June of each year shall appoint said committee." [emphasis added]

The Special Education Act provides for two kinds of parental participation -- advisory committees and due process procedures. The purpose of these mechanisms was explained in Acts 1972, c. 766, sec. 1, which stated, in pertinent part:

> "Recognizing, finally, that present inadequacies and inequities in the provision of special education services to children with special needs have resulted largely from a lack of significant parent and lay involvement in overseeing, evaluating and operating special education programs, this act is designed to build such involvement through the creation of regional and state advisory committees with significant powers and by specifying an accountable procedure for evaluating each child's special needs thoroughly before placement in a program and periodically thereafter."

Extensive accountability procedures are set forth in M.G.L.A. c. 71B, sec. 3 (Acts 1972, c. 766, sec. 11). On the one hand, no school age child with special needs can be refused admission to public school by a school committee without the prior written approval of the Department, and if such consent is given the child is still entitled to an alternative form of education approved by the Department. On the other hand, no child can be placed in a special education program without a referral, consultation with parents, evaluation, and periodic re-evaluations, and parental consent. If, after exhaustion of all of the administrative procedures in c. 71B, sec. 3, the parent still does not approve of the placements recommended by the school committees or appropriate state official, a court order must be obtained

to override the parent's opinion. If school officials recommend a special placement, but the parent wants its child in a regular education program, then,

> "the department and the local school committee shall provide the child with the educational program chosen by the parents . . . except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program."

If the situation is reversed — the parents want a special placement but the school committee wants to keep the child in the regular program — then the matter is referred to the state advisory committee on special education. If the parents reject the determination of the committee,

> "they [school officials] may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program."

Finally, there is a paragraph buried in this lenghty section which should be pointed out. Section 3 contains this paragraph:

> "No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular program."

Cases have been publicized, though it is hard to know how frequently they have occurred, of situations in which parents were practically unable to avail themselves of formal rights to educational services for their children because the school put on them some of the burden of taking care of a child's special handicap. For example, a parent whose child was incontinent was required by the school to come to the school several times daily to change the child's diapers, at great inconvenience and expense to the parent. Section 3

is not a blanket form of protection for parents, since there is no setting of a limitation on what burdens might be placed on parents with children in "regular" programs. It does, however, prevent the placing of added burdens on parents who have taken advantage of their rights to obtain special services for their children.

The most dramatic allocation of curriculum-determining power to parents is contained in M.G.L.A. c. 71, sec. 13, already mentioned several times and quoted in full in the following section. This is the provision that allows twenty parents, in a high school with an enrollment no less than 150 students, to petition for the offering of "any" course not already in the high school's curriculum. We have already discussed the question whether this statute is an unconstitutional delegation of policy-making authority to private persons, and we have suggested narrowing constructions which might save the statute from this state constitutional infirmity. See supra at 11 and at .

6. Students

The change in the status of students in public school affairs in Massachusetts is even more dramatic than the increased authority of parents. There are statutorily mandated student advisory committees in every school district. A student, selected by other students, sits on the State Board of Education as a voting member. High school students can initiate courses in their schools. Finally, the legislature has dramatically broken with a more than century-old state law tradition of broad school committee discretion in controlling student conduct, by enacting a local option law codifying student "rights and responsibilities."

First, as to the political representation of students, student advisory committees are mandated by M.G.L.A. c. 71, sec. 38M:

> "School committees of cities, towns and regional school districts shall meet at least once every month, during the months school is in session, with a student advisory committee to consist of five members to be composed of students elected by the student body of the high school or high schools in each city, town or regional school district."

In 1974, the legislature directed the Commissioner to appoint an election procedure committee, with no less than three-fourths of its seats to be held by public secondary school students.

> "Said committee shall establish procedures for the election of members to student advisory committees in secondary schools . . . . Said election procedures need not be uniform for all schools." Acts 1974, c. 92.

The local student advisory committees elect representatives to regional councils, and the regional councils elect the student who sits on the Board. M.G.L.A. c. 15 sec. 1E, and c. 71 sec. 38M.

Second, there is the right of high school students to initiate courses in their schools, if they have the backing of 5% of the student body. This right was created by a June 1975 amendment to M.G.L.A. c. 71, sec. 13, which had already provided for parent-initiated high school courses. We have discussed the possible infirmity in this statute as an unconstitutional delegation to private persons of policy-making powers, and we have suggested interpretations of the law that could save it from invalidation. See supra at 11 and at 26. At this point, we will quote this unique law in full, as amended most recently by Acts 1975, c. 305 (June 1975).

> "In every public high school having not less than one hundred and fifty pupils, any course not included in the regular curriculum shall be taught if the parents or guardians of not less than twenty pupils or of a number of pupils equivalent to five per cent of the pupil enrollment in the high school, whichever is less, request in writing the teaching thereof, provided said request is made and said enrollent is completed before the preceeding August first and provided a qualified teacher is available

> to teach said course. The teaching of any course as provided by this section may be discontinued if the enrollment of pupils falls below ten. Such courses as may be taught under this section shall be given the same academic credit necessary for a high school, provided that the school committee shall make a determination as to the credit equivalency of such course prior to its being offered." [emphasis added]

Third, the "rights and responsibilities" of high school students are defined in M.G.L.A. c. 71, secs. 82-86, added by Acts 1974, c. 670. These provisions, which are quoted in full below, protect student expression, both verbal and symbolic; student dress and personal appearance; and student decisions about marriage and pregnancy. The statutory standards are harmonious with (and for the most part more far-reaching than) federal court decisions in the District of Massachusetts and the First Circuit which have struck down unconstitutional attempts to regulate student conduct. E.G. Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970), (speech); Ordway v. Hargraves, 232 F. Supp. 1155 (D. Mass. 1971),(pregnancy); Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970), (grooming); Pierce v. School Committee of New Bedford, 322 F. Supp. 957 (D. Mass. 1971). Another innovation of the new law is that it potentially involves the State Board of Education in standard-setting for local disciplinary actions by authorizing the Board to adopt guidelines for implementation of the new sections. School committees "shall" adopt guidelines consistent with the Board regulations (presuming the Board chooses to make such regulations). Also, students have a right to have their views about appropriate fules heard and considered by the school committees prior to the adoption of said rules.

As we have noted, this new law on student rights is a local option statute. Section 86 provides:

> "The provisions of sections eighty-one to eighty-five, inclusive, shall apply only to cities and towns which accept the same."

The enactment surely indicates what principles regarding student conduct the legislature would follow if it were a school committee. But the law-makers stopped short of imposing their will on the school committees. Of course, it is not the school committees, but the municipal governments which decide whether to adopt the student rights code. Thus, while the state has not dictated a student bill of rights to the localities, it has taken the decision as to whether the school committee will be the primary rule-maker in this area out of the hands of the school committees and put it in the hands of municipal government. The same thing was done with respect to sex education advisory committees under M.G.L.A. c. 71, sec. 38(O), noted in our preceding section. In the case of the student rights enactments, however, the new provisions are unlikely to be construed to have a pre-emptive effect. The legislature cannot be presumed to have intended that in any township not accepting the law the school committee would have no authority to regulate student conduct.

The rights and responsibilities of students are as follows:

> "Section 82. The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions. Any assembly planned by students during regularly scheduled hours shall be held only at a time and place approved in advance by the school principal or his designee.
>
> No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.

For the purposes of this section and sections eighty-three to eighty-five, inclusive, the word student shall mean any person attending a public secondary school in the commonwealth. The word school official shall mean any member or employee of the local school committee.

Section 83. School officials shall not abridge the rights of students as to personal dress and appearance except if such officials determine that such personal dress and appearance violate reasonable standards of health, safety and cleanliness.

Section 84. No student shall be suspended, expelled, or otherwise disciplined on account of marriage, pregnancy, parenthood or for conduct which is not connected with any school-sponsored activities; provided, however, that in the case of a pregnant student, the school committee may require that the student be under the supervision of a physician.

Section 85. The board of education may adopt guidelines to implement the provisions of sections eighty-two to eighty-four, inclusive. School committees shall adopt rules and regulations consistent with guidelines of the board of education and the provisions of sections eighty-two to eighty-four, inclusive. The rules and regulations to be made by school officials shall be established only after notice to public school students and after a public hearing at which students' views, shall be presented and shall be taken into consideration by such officials. Said rules and regulations shall provide that, notwithstanding the existence of the rights and responsibilities described in the three preceding sections, school committees or school officials may take necessary action in cases of emergency. Students may petition for a hearing, to be held as soon as practicable after such emergency, as to whether such rules and regulations shall be revoked or modified." [emphasis added]

7. Taxpayers

Taxpayers are not accorded any special status in the control of school affairs, with the exception of the creation of a special taxpayers suit in M.G.L.A. c. 71, sec. 34. It will be remembered that this is the

statutory basis of school committee fiscal autonomy. It requires municipalities to appropriate all the funds which the school committee deems necessary for the conduct of public education. That section provides, in part:

> "Upon petition to the superior court, sitting in equity, against a city or town, brought by ten or more taxable inhabitants thereof, or by the mayor or a city, or by the attorney general, alleging that the amount necessary in such city or town for the support of public schools as aforesaid has not been included in the annual budget appropriations for said year, said court may determine the amount of the deficiency, if any, and may order such city . . . to provide a sum of money equal to such deficiency, together with a sum equal to twenty-five per cent thereof." [emphasis added]

VI. Private Education

There is no direct regulation of private education in Massachusetts. The primary mode of indirect regulation is through enforcement, or threat of enforcement, of the compulsory attendance law. We have already discussed this statute at some length in our section on local districts, supra at 85 . The topic was brought up there, rather than reserving it for this part of the chapter, because the broad discretion it bestowed on school committees illustrated the theme of that section -- the Massachusetts tradition of school committee "supremacy." It was noted that parents who do not send their children to public school must submit them to a course of instruction that is deemed by the school committee to be substantially equivalent to the public school curriculum. Not only is the school committee left to its own judgment in making the comparison, but also the burden is on parents to obtain advance approval of the course of study they contemplate.

Another way in which the compulsory attendance law can act as an indirect regulator of private education, is when it is used as a standard in civil proceedings regarding the custody of a child, or charges of child neglect. For example, in Colgoy v. Colgoy, 203 N.E. 2d 546 (1964), the Supreme Judicial Court upheld a probate judge's decree giving to the husband of a separated couple custody of their five children. The mother lived in a religious center where,

> "the children have no normal family life, slight contact with the outside world, and go to the center's religious school which has not been adequately investigated by public authorities." 203 N.E. 2d at 547.

Private, profit-making correspondence schools are regulated by the Commissioner of Education under M.G.L.A. c. 75C. The Attorney General's

Office and the Federal Trade Commission can also get involved if they are presented with charges of deceptive advertising or fraud. In March and April of 1974, the Boston Globe published a series of extrerely detailed, thoroughly researched, and sharply pointed articles revealing many abuses in the private profit-making vocational school business. The newspaper's investigation revealed widespread use of false advertising and high pressure tactics, and low quality instruction in most of these schools.

FOOTNOTES : I. Constitution

[1]See also, Antonelli v. Hammond, 308 F.Supp. 1329 (1970), where it was held that the imposition of editorial control on a campus newspaper by administrators at a state university violated the First Amendment.

[2]Constitution, Chapter 5, Section 2:

> "[I]t shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns;" [emphasis added]

[3] Constitution, Amendments, Article II as amended by Art. LXXXIX, ratified November 1966. (The "Home Rule Amendment")

[4]There has been much experimentation by Massachusetts school committees with the alternative school concept. See, Kaleidoscope 8, (Massachusetts Department of Education, Fall 1973), a publication of the State Department of Education, for a capsulized description of 18 such schools. Also, a public alternative school system was established under the experimental schools systems enabling provision which is part of M.G.L.A. c. 15, sec. 1G. Its community control-oriented governing structure was responsible directly to the State Board, which totally funded the project.

[5]The Court also held that Corning retained no property right in the goods after their sale and resale by virtue of its ownership of a trademark. The Arizona Supreme Court reached the opposite conclusion in Skaggs Drug Center Inc. v. U.S. Time Corp., 101 Ariz. 392, 420 P.2d 177 (1966).

FOOTNOTES : II. Legislature

[1]M.G.L.A. c. 71B.

[2]M.G.L.A. c. 71A.

[3]See Section III(c).

[4]Former c. 17, §13A.

[5]Former c. 17, §13C.

[6]Former c. 17, §13E.

[7]Former c. 17, §13B.

FOOTNOTES : III. State Agencies

[1]Modernizing School Governance for Equality and Diversity (1972), at 79.

[2]G. Hottleman, "The Accountability Movement," 52 Massachusetts Teacher No. 4, 8 (Jan. 1974).

[3]L. Kotin, "Equal Educational Opportunity: The Emerging Role of the State Board of Education," Boston U.L. Rev. 211, 212-213.

[4]School Committee of New Bedford v. Commissioner of Education, 349 Mass. 410, 208 N.E. 2d 814, 817 (1965).

[5]208 N.E. 2d at 818.

[6]Governor Sargent, FY 75 Budget: Summary of Programs, at 124.

[7]Modernizing School Governance, supra.

[8]The following evaluation of M.E.S.S. is an excerpt from A. Block, "A Proposal for Funding Public Alternative Schools in Massachusetts," unpublished thesis, Harvard Law School, 1974, pp. 52-55.

The Massachusetts Experimental School System[1] is made up of three schools spanning grades K-12, located in the Dorchester-Roxbury communities of Boston. Created, funded and supervised by the state, it is seen as a floating alternative school district drawing students from a far-flung territorial base.[2] No one involved in the project wants the state to get into the business of running school systems.[3] The legislature permitted the establishment of

> "no more than three experimental school projects[4] for the development of educational innovations. . .

M.E.S.S. is supposed to be a laboratory, a model, and a disseminator.

M.E.S.S. is both a success and a failure. It has failed to measure up to its original objectives -- the state has paid a large bill for five years and still has not gotten showcase schools in return. A six-person evaluation team (appointed by the Board with the advice of the system's governing board), concluded in April 1973:

> "The impact on outside agencies.[5] . . is almost non-existent at the moment."

So much for dissemination. This lack of impact and outreach even extended to the curriculum.

> "Use of community and greater Boston resources[6] are traditional and short-lived."

Moreover, the system's student population is a far cry from the racial, ethnic, income, geographical mix which was provided for in the original plan.

Though neither a showcase, nor a service center for other school systems, M.E.S.S. has improved educational opportunity in the Dorchester-Roxbury area. The evaluation team's basic conclusion was this:

> "The Massachusetts Experimental School System, although beset by problems many not of its own making, is offering a competent educational alternative to Boston Area public schools. Difficulties are acknowledged openly and honestly

by the staff and refinements and modifications are continuously made. The direction is clearly ahead and up." [7] (emphasis added)

Isn't this a sufficient reason for continuing the public funding of M.E.S.S.? For public funding, yes; for complete state support, no. Categorical state grants are meant to be high-powered dollars, meeting needs that are beyond the means of localities. Why should the Department of Education use hundreds of thousands of dollars to pay the salaries of the system's teachers and administrators when the experiment's contributions as a change agent are still hypothetical? The same money could be used to support a variety of interdistrict services, such as teacher centers. So long as everyone involved in the experiment has a space program mentality -- that the way to improve (educational) technology is to concentrate resources in centralized research and development projects and then export the hardware -- every time the system's supporters sit down with public officials to negotiate refunding, they will have to promise the moon. For example, the evaluators propose that the system be given a separate grant to set up an "advisory service" for helping other school systems. No reason is given why such a service should be set up in conjunction with M.E.S.S., as opposed to some other school or none at all; such an extra expenditure needs strong justification since the state is already paying for a large administrative and teaching staff. If the state did create the advisory service, and three years later it did not produce much, the experiment's credibility would be destroyed.

The dialogue is pushed into th treacherous paths because the premises are wrong. If five years of state funding have created a competent alternative educational center, there is something worth saving. The proper question is not -- "Should the state gamble more money on

producing an educational showcase?" but "What is the appropriate method for public funding of a successful independent school?" The Public Alternative School System offers an answer:

a) The districts in which the students reside should pay the basic costs of the system, on a per capita basis.[8]

b) The state should pay the incremental costs arising from the unconventional purposes of the system, including:

1. Transportation expenses for bringing in children from many communities.
2. Operating costs associated with testing of new techniques (e.g. extra floorspace; high teacher/student ratio).
3. Planning and evaluation expenses for experimental programs.
4. Compensation for lost economies of scale to districts which "lose" substantial numbers of pupils. (Another way to achieve this is to define the per capita transfer in (a) as the <u>marginal</u> cost per child, rather than the <u>average</u> cost.)
5. Cost of outreach services.

This formula puts the state back into the position of supplying only high-powered dollars. It only pays the <u>incremental</u> costs of innovations. The money that the Department of Education has spent for basic funding at M.E.S.S. over the last five years could have paid the incremental costs of <u>several</u> similar programs.

Who could complain if the General Court funded M.R.S.S. in this way? Parents and children participate by choice and they are represented in

their school's "unit Board" and in the system-wide governing board. Localities are held harmless against financial loss. The experimental system's leadership would still have to justify the experiment's cost before the state, but they would not have to promise and produce a super-school; only a good alternative school -- which is hard enough to achieve.

FOOTNOTES (M.E.S.S.) (These are footnotes to the long text of footnote 8)

[1]The planning group and original governing board was known as C.C.E.D.

[2]The Continuation Proposal (Sept. 1, 1972-June 30, 1975), divides Roxbury, Dorchester, Mattapan, Jamaica Plain, the South End, Boston, Cambridge, Somerville, Medford, and Brookline into four "target communities."

The system, however, has fallen short of attracting the kind of integrated student body it sought. See A Report to the Massachusetts State Board of Education on An Evaluation of the Massachusetts Experimental School System (E. Clinchy, chrm. of evaluation team, April 1973), at 6-7. (hereinafter referred to as Clinchy Report).

[3]"The State Department, whatever its considerable virtues may be, is an organization that simply is not set up or in any way equipped to operate an on-going school system, especially an experimental system whose main requirement is that it have the flexibility to devise different, unusual and as yet untried ways of doing things." Clinchy Report, at 3.

[4]M.G.L.A. ch. 15, sec. 1G, ¶6.

[5]Clinchy Report at 60.

[6]Id., at 46.

[7]Id., at 34.

[8]This idea was also brought up by the evaluators, Id., at 5.

Footnotes to main text resume on next page.

Footnotes to text (continued)

[9]It noted the limits imposed on the judiciary by the separation of powers provision of the Massachusetts Constitution, stressing that the primary duty to correct racial imbalance rested with the executive. On one occasion the Court reversed the decree of a trial judge who became "too involved" in the details of desegregation. 287 N.E. 2d 338, 347, 348.

[10]This narrative is primarily based on a May 28, 1974, interview with Dr. Lawrence Bongiovanni of the Department of Education, who was in charge of the Department's efforts to draft minimum curriculum standards for Board approval. Some points are amplified by conversations with local administrators, and by information from newspaper articles.

[11]See Regionalization, "phase I," Massachusetts Department of Education.

[12]See M.G.L.A. ch. 71, secs. 37C and 37D; ch. 15, secs. 1I and 1J.

[13]M.G.L.A. ch. 15, sec. 1J.

[14]M.G.L.A. ch. 15, 1I.

[15]The cases analyzed below are:
School Committee of Springfield v. Board of Education, 287 N.E. 2d 438 (1972), (hereinafter Springfield).
School Committee of Boston v. Board of Education, 292 N.E. 2d 338 (1973), (hereinafter Boston I).
School Committee of Boston v. Board of Education, 292 N.E. 2d 870 (1973), (hereinafter Boston II).
School Committee of Boston v. Board of Education, 302 N.E. 2d 916 (1973), (hereinafter Boston III).

[16]Springfield; Boston I.

[17]Springfield, at 455.

[18]Id.

[19]Id., at 451-2, 456.

[20]Boston I, at 344.

[21]Id., at 345; Springfield, at 451.

[22]Springfield, at 449.

[23]Springfield, at 465.

[24]Boston III, at 920-921.

Footnotes to text (continued)

[25]Boston III, at 919, 921.

[26]Springfield, at 451.

[27]Boston III, at 919.

[28]Id., at 924.

FOOTNOTES : IV. Courts

[1]The U.S. Supreme Court would not have jurisdiction on an appeal from the SJC, to review its determination of the federal question. The state court's determination would stand as an uncertain precedent.

[2]M.G.L.A. c. 231A, sec. 1.

[3]Edelman v. Jordan 415 U.S. 651 (1974).

[4]M.G.L.A. c. 30A, sec. 14, "Except so far as any provision of law expressly precludes judicial review. . . "

[5]See also, South Shore Nat. Bank v. Board of Bank Incorporation, 351 Mass. 363, 220 N.E. 2d 899 (1966), economic injury in itself not sufficient to confer standing to challenge administrative action.

[6]Several First Circuit abstention decisions are noted or discussed infra, in our section on scope of review.

[7]The inadequacy of the other remedies is argued in 1963 Annual Survey of Massachusetts Law 131-135.

[9] Compare this situation to Arizona, where mandamus is commonly used to challenge exclusions of children from school. There, the prerequisites to using the other actions are much stricter.

[9] M.G.L.A. c. 249, sec. 5.

[10] M.G.L.A. c. 249, sec. 4.

[11] See, e.g. Martin v. Director of the Division of Employment Security, 347 Mass. 264, 197 N.E. 2d 594 (1964).

[12] M.G.L.A. c. 15, sec. 1J.

[13]But agency interpretations of the statutes under which they operate may be given great wieght when the law is intertwined with complex policy questions.

[14]M.G.L.A. c. 71, sec. 42.

[15]Section 14(7) provides:

> "If application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence, and shall file with the reviewing court . . . the additional evidence, together with any modified or new findings or decision."

[16]Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).

[17] Reed v. Board of Election Commissioners, 459 F. 2d 121 (1st Cir. 1972); Druker v. Sullivan, 458 F. 2d 1272 (1st Cir. 1972).

[18] Castro v. Beecher, 459 F. 2d 725 (1st Cir. 1972).

[19] Wulp v. Corcoran, 454 F. 2d 826 (1st Cir. 1972).

[20] A hearing was not required; the court pointed out that the written explanation requirement was an extremely slight inconvenience for the board, considering the substantiality of the teacher's interest.

[21] For due process analysis applied to school disputes by the U.S. District Court, Massachusetts, see Hassen v. Boothby, 318 F. Supp. 1183 (1970), students suspended from athletic teams; Pieroe v. School Committee of New Bedford, 322 F. Supp. 957 (1971); student expelled from school.

[22] See, K. Ostrander, "The Teacher's Duty to Privacy," 57 Phi Delta Kappan 20 (September 1975).

FOOTNOTES: V. Local Districts

[1]Under a public employees collective bargaining act enacted in 1973, M.G.L.A. c. 150E, §8, an arbitrator might re-instate a teacher who was fired because she assigned books and lessons the school committee thought in bad taste.

[2]M.G.L.A. c. 71, §13, as amended by Acts 1975, c. 305.

[3]M.G.L.A. c. 71, §34.

[4]The School Committee of Boston has fiscal autonomy insofar as planning and funding capital improvements is concerned. Its actions, however, must be approved by a four-fifths vote. Acts, 1936, c. 224, as amended by Acts, 1963, c. 786, §2. The committee may adopt a budget for other school purposes which is not in excess of a figure calculated by the city auditor according to a statutory formula, one which limits the range of yearly increases. Even this budget may be rejected by the mayor, but the veto can be overriden by a four-fifths vote. Sections 2B, 3. These funding categories and procedures restrict committee discretion much more than the generally worded §34 of c. 71. Also, the ten-taxpayer suit of §34 does not apply to Boston. Pirrone v. Boston, 305 N.E. 2d 96 (S.J.Ct. Mass. 1973). However, when there is consensus among the three main institutions of local government, the funding possibilities are more open-ended:

> "Nothing in this section shall prevent the mayor, on request of the school committee, from recommending and the city council from passing additional appropriations for school purposes." Acts, 1936, supra, §2(c)

Some other peculiarities of school governance in Boston are:

The Boston City Charter does not permit the City Council to make institutional changes in the school committee, as it can make in other city departments. Also, the committee's rule-making powers are not subject to review by any local governmental body. Acts 1948, c. 452. Another peculiarity in the Boston arrangement is that the committee is required to elect a superintendent for a six year term (subject to removal for cause) and it can only appoint to lesser administrative positions persons who have been nominated by the superintendent. Acts,1906, c. 231, §1 as amended by Acts, 1965, c. 208, §1.

[5]Acts 1973, c. 1078, §2; M.G.L.A. c. 150E, § 6.

[6]Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970); Leonard v. S.C. of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965).

[7]Anne DeCanio et. al. v. School Committee of Boston, 358 Mass. 116, 260 N.E. 2d 676 (1970), appeal dismissed and cert. denied (for lack of jurisdiction) 401 U.S. 929 (1971); Drown v. Portsmouth School District, 435 F. 2d 1182 (1st Cir. 1970).

[8]Antonelli v. Hammond, 208 F. Supp. 1329 (D. Mass. 1970), Keefe v. Geanakos, 418 F. 2d 359 (1st Cir. 1969).

[9]A suit has been filed in federal court charging that the at-large system of election of committee members violates the Fourteenth Amendment because it excludes black people from equal participation in the election process. The standard of proof the plaintiffs will have to meet in this case is probably that of White v. Regester, 412 U.S. 755 (1973).

[10]M.G.L.A. c. 150E, § 6.

[11]In Parts 5 and 6 of this section, dealing with the roles of parents and students, we discuss the most recent statutory trends which counter the tradition of school committee autonomy. The most striking new laws are those providing for parent and student-initiated courses, due process procedures in special education placements, student rights, and sex education advisory committees. The latter two are local option statutes, but are still significant indications of the changing points of view of the legislatures. All of these statutes have some pre-emptive effect, though to widely varying degrees.

[12]Pomerantz v. Clark, 101 F. Supp. 341, 346 (D. Mass. 1951).

[13]Russell v. Inhabitants of Lynnfield, 116 Mass. 367 (1874); Hodskins v. Inhabitants of Rockport, 105 Mass. 475 (1870); Nicholls v. Mayor and School Committee of Lynn, 297 Mass. 65, 7 N.E. 2d 578 (1937); Harwood v. Hyde Park, 195 Mass. 29, 80 N.E. 650 (1907); Sherman v. Inhabitants of Charlestown, 62 Mass. 160 (1850); Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965).

[14]See especially infra, at 105, for a discussion of Acts 1974, c. 670, amending M.G.L.A. c. 71 by adding §§82-86, "Rights and Responsibilities of Students,"

[15]349 Mass. 704, 212 N.E. 2d 468 (1965).

[16]212 N.E. 2d 468, 470.

[17]Id., at 473.

[18]424 F. 2d 1281 (First Cir. 1970).

[19]Id., at 1286.

[20]Atty. Gen. Op., Jan. 21, 1938, p. 36.

[21]M.G.L.A. ch. 76, sec. 1.

[22]Compare Counort v. Washington, 124 P. 2d 910 (S.C. Washington 1912) and Rice v. Commonwealth, 49 S.E. 2d 342 (S. C.O.A. Virginia 1948), with Commonwealth v. Renfrew, infra (note 25).

[23]If there is no dispute as to whether or not they had obtained the committee's permission.

[24]New York Education Law, secs. 310, 311, 2590-g(10) (McKinney 1970).

[25]332 Mass. 492, 129 N.E. 2d 109 (1955).

[26]Even in the State of Washington, which also has an "approved in advance clause", under Counort, supra (note 22).

[27]Atty. Gen. Op., Feb. 10, 1964, p. 185.

[28]241 Mass. 325, 135 N.E. 459 (1922).

[29]241 Mass. 325, 329; See also Wulff v. Wakefield, 221 Mass. 427, 109 N.E. 358 (1915) (committee control over "administrative details").

[30]See infra, at 133-135.

[31]School Committee of Salem v. Gavin, 333 Mass. 632, 132 N.E. 2d 396 (1956).

[32]M.G.L.A. ch. 71, sec. 34.

[33]Ten taxable inhabitants, the mayor, or the attorney general.

[34]Hayes v. City of Brockton, 313 Mass. 641, 48 N.E. 2d 683, 686 (1943).

[35]Id.

[36]148 Mass. 518, 174 N.E. 2d 426 (1961).

[37]174 N.E. 2d 426, 427.

[38]Id., at 429.

[39]M.G.L.A. c. 71, §§42 et. seq., as amended by Acts 1975, c. 199, and c. 337.

[40]c. 71, §§42D, 43, 43A, 43B.

[41]The federal court's decision of that issue would have to be under its pendant jurisdiction over a properly presented state claim.

[42]M.G.L.A. c. 71, §38, and c. 149, §1781, at that time.

[43]Added by Acts 1973, c. 1078.

[44]c. 150E, §§ 2, 6.

Conclusions and Recommendations

I. The State Constitution

1. The courts in several of the states studied, California, New York, and Arizona, have moved toward the recognition of a right to an education based upon the constitutions in those states. This legal development may have a profound impact in those states:

a. A recognized right to an education may affect the kind of education that must be provided by the public schools. For example, a right to an education might imply a right to a minimally adequate education as measured by some standard of student achievement. The right might also be interpreted as assuring students a certain minimal level of services and facilities. The right might function to encourage judicial suspicion of inequalities in educational achievement or in the provision of educational services. These inequalities having become suspect, the state would have the burden of justifying them. For example, in both California and New York the courts have begun to tackle the problem of the unequal provision of services: in California the whole state system of educational finance was struck down, whereas in New York the courts have looked closely at the provision of services to handicapped pupils. In Arizona the courts have said the accident of personally being without funds may not bar access to basic educational materials.

b. A recognized right to an education may affect the courts in interpreting the extent to which authority has been delegated to state and local officials. Courts which recognize such a right might, for example, narrowly interpret the authority of local officials to exclude students from certain programs or the courts might require that certain procedures be followed before

the student is excluded, or the courts might be quicker to declare that a school district has abused its discretion.

c. A recognized right to an education may have the related effect of increasing the courts' willingness to require educational officials to take affirmative steps. Most courts tend to restrict themselves either to imposing only negative limitations on officials or ordering them to take affirmative action only if the duty involved is ministerial. Recognition of a right to an education may lessen this sort of judicial restraint and lead the courts into a more active role in educational affairs.

2. We found state constitutions deal only in the most general terms with the allocation of authority. The constitutions in establishing the state board of education and/or the chief state school officer do so without specification in detail of their constitutional duties. Only one state Constitution, Florida's, required as a matter of constitutional law the establishment of local educational districts. As a result of the sparse text of these state constitutions, wide discretion was left to the state legislatures to shape the educational system of the states, to create roles and allocate authority. A further implication is that the state constitutions did not importantly stand in the way of innovative arrangements for the governance of education in the state. And for the most part legislatures have not taken advantage of the leeway afforded them -- the overall pattern of organization found in the states studied conforming in general outline to that pattern found in many other states throughout the nation. California is the one exception to this rule insofar as the legislature has adopted special enabling acts to permit the operation of a voucher system and a system of "alternative schools" upon approval by the state. (Cal. Educ. Code, Sections 31175 et. seq.; S.B. 445) In establishing these options the legislature had

to design carefully these new organizational structures to make them conform with state constitutional provisions prohibiting the transfer of authority over any part of the public school system to any body other than the Public School System, and prohibiting the appropriation of state money to any school not under the exclusive control of the officers of the public schools. (Cal. State Const. Article IX, Section 8) A similar provision in the constitution of Massachusetts has had the effect of forcing a sharp and rigid dicotomy between public and private schools.

3. A related finding is that while the delegation doctrine remains alive in several states, e.g., Florida, it does not seem to pose an insuperable bar to significant decentralization of the educational system in the states nor to the creation of innovative forms for governing public education. Even in states in which the doctrine occasionally springs to life to claim a statute as a victim, legislatures can avoid this fate for their handiwork by drafting the legislation to take into account the objections courts have raised in the past and which led them to strike legislation down under the delegation doctrine. But it was found that despite the leeway provided by the state constitutions little advantage was taken by the state legislatures. The one state that might be termed an exception to this rule is Massachusetts with its law providing for, in high schools of over 150 pupils, the right of twenty parents or 5% of the student body to petition and demand a local district for the establishment of a new course of their choosing. Also, we saw in Florida and New York tentative steps taken toward greater parental involvement in school decision-making: in Florida each district is required to establish at least at the county level a parent advisory group and in New York City local boards are required to recognize parental advisory groups. These groups are without actual power, hence do not run afoul of the doctrine against the delegation of

authority to private groups.

4.State constitutional provisions prohibiting the establishment of religion have played no important historical role in shaping education in the states studied except, as noted above, in Massachusetts. The U.S. Constitution's First Amendment has been a more important influence having been the basis on which the recitation of prayers and the reading from the Bible has been prohibited. The U.S. Constitution, however, permits released time programs, just as do the state constitutions. State constitutions, in the hands of state courts generally have been interpreted to allow more in the way of religion into the schools than the U.S. Constitution.

5. State constitutional provisions dealing with such civil rights as free speech, due process and equal protection have played a negligible role in either allocating roles or defining the scope of official authority. The major exception to this rule is to be found in California where California's equal protection clause was the basis for the decision striking down the educational finance system of the state. That exception aside, it has been the Bill of Rights plus the Fourteenth Amendment of the U.S. Constitution which has played the greater role in shaping the allocation of authority over the curriculum in the states.

6. In sum, legislatures have been left considerable discretion by the state constitutions studied to allocate authority to control the public school curriculum. Only in the nascent concept of a right to an education do we see a potential for state constitutional doctrine playing a larger role in constraining legislative discretion.

II. Role Allocation by the State Legislature: State - Local Relations

7. In carrying out their responsibility to allocate roles in the system for controlling school curriculum the state legislatures have established the following separable roles and powers:

a. Authority to establish minimum standards for the school program. The standards might be stated in input terms (e.g., this course must be taught) or output terms (e.g., students should achieve level X in reading by the eighth grade.) State boards are frequently given the authority to establish minimum standards. Usually this authority is interpreted to mean the power to establish certain minimum input requirements, and usually this authority extends to all courses that must or may be offered by the public schools. In Massachusetts, however, the state board was given authority to establish standards only for courses which local districts require their students to take. Presumably these courses include those which by state statute students are required to take as well as those courses the local district in its discretion has required its students to take. The state board, however, is not permitted to establish standards for electives. In Arizona a state statute directly requires that students, before graduating to junior high school, must be able to read at a certain level. (See section II of the study of Arizona.) No state board was clearly given authority to order the provision of new courses not demanded by the legislature. For their part local boards of education typically are permitted to establish minimum standards which are higher than the minimum standards promulgated by the state board. Usually it is only the local boards which establish minimum output standards. However, there is a tendency to move away from this pattern as state boards become increasingly interested in seeking authority from the legislature to promulgate output standards toward which

localities must strive. Note that many of the roles outlined below could be included under this more general authority to promulgate minimum standards.

b. Authority to establish educational priorities. Typically the legislature establishes its own educational priorities by mandating which courses must be offered and taken in the public and private schools of the state. State boards can influence the establishment of priorities by adding additional minimum requirements to those promulgated by the legislature, e.g., specifying the minimum number of hours that must be offered in a given subject. As state boards obtain authority to establish output goals as part of a more general grant of authority to assesse students in the state with standardized tests, they also gain additional de facto authority to establish educational priorities. But, for the most part, the establishment of educational priorities is left importantly to local districts. In Massachusetts the state board is attempting to influence the establishment of these priorities by local districts by gathering information from students and citizens as to their expectations vis-a-vis the schools. The results of this educational survey are then published to inform decision-makers as to what their constituencies want from the schools.

c. Authority to veto the offering of a particular course or program. Local districts generally have the power to initiate or propose new courses and programs, but state boards, chief state school officers and/or departments of education may be given the authority to review and veto the proposed course or program. Sometimes this authority is expressly granted; sometimes this authority is simply claimed by the state agency; and sometimes the authority is part of a larger grant of authority to the chief state school officer to act in a quasi-judicial capacity when complaints are brought to him by persons

aggrieved by local district actions.

d. Authority to select educational materials. At one extreme we find that this authority has been given only to the local districts. At the other extreme we find states in which this authority is shared by state and local officials; which agency, state or local, has the larger role can vary from state to state. Under the shared arrangement one state agency usually has the authority to select basic textbook and other instructional materials,as well as, perhaps, even some of the so-called supplemental materials. Local districts are then left with the authority to select additional supplemental materials which may not be substituted for the basic texts selected by the state. Under some arrangements, as in Florida, the local district has additional leeway to obtain the materials it wants by foregoing state support for these materials. The option is sometimes provided to districts to seek specific ad hoc approval of books not on the approved list. And in most states the state agencies are required to select a minimum number of books for a given subject and/or class so as to assure a range of choice for the districts. In Arizona the state must select between three and five texts per grade/course/subject. The range is greater in California. What is not clear from these statutes is the extent to which these requirements obligate the state to place on the approved list books and materials that represent a true variety of viewpoints and approaches. In Arizona local districts face a separate problem. If the state approves a certain item, it falls into the capital budget which is not limited in size by state law; that budget can be expanded indefinitely without seeking voter approval. If a textbook is not approved by the state, it falls into operations budget which is limited in size by state law; the limitation can only be lifted upon voter approval. Since most districts have reached the limitation on the operating budget,

they prefer to place as many items as possible in the capital budget to avoid seeking voter approval for large tax increases. State approval then becomes important for another reason. Finally, whatever agency has authority to select materials, the states differ in the extent to which substantive limitations are imposed -- limitations dealing with such matters as the selection of subversive materials or materials with a discriminatory message.

e. Authority to determine the content of particular courses. The general grants of authority to state boards to establish minimum standards opens the door to the exercise of authority to determine the content of specific courses. States generally have not taken the legislature up on this opportunity; but in a couple of notable instances in Arizona the state board did try to prescribe course details but these efforts were beaten back. Typically states limit their exercise of this authority to determining the content of physical education and driver education courses. Hence, for the most part this authority has been left to the local districts. California is notable for the extent to which the legislature itself has spelled out the content of some of the social studies courses in state statutes.

f. Authority to specify anti-discrimination prohibitions bearing on course content. Presumably both state and local officials have such authority in all states, even though it is not exercised. In most states the promulgation of such restrictions has been undertaken only the state legislature.

g. Authority to establish elective courses. State legislatures have occasionally required that a course be offered without requiring that students take the course. State boards generally do not have authority to order the provision of a new course. This basic authority is in the hands of the local district, which after meeting the basic statutory requirements as to what must

be offered, may determine what additional courses will be made available. Whether these courses are to be elective or required courses takes us to the question of authority to establish graduation requirements.

h. Authority to establish high school graduation requirements. It is not common for the state legislature to establish high school graduation requirements in any detail; typically these requirements are implied from the statutory requirements as to which courses must be taken by students. Arizona has, however, established minimum reading requirements before a student may graduate to junior high school. And the California legislature has explicitly established minimum graduation requirements. Additionally, state boards of education have the authority to establish these requirements. And local districts may attach additional requirements to the minimum requirements established by the legislature and/or state board. Presumably there is some limit to the number of additional requirements local boards may attach but this question was not litigated in any of the states studied.

i. Authority to determine the general amount of exposure to school that is required of each student. Here again the basic authority is exercised by the state legislature which establishes the compulsory education requirements, the minimum length of the school year, month, week, and day. State boards play a minor role in this area as do local districts as both tend to conform to the minimums established by the legislature rather than adding on additional requirements. In any event, if a local district attempted to extend the compulsory education requirements a serious question of state preemption would arise.

j. Authority to enforce curriculum requirements. State boards, the chief state school officer and the departments of education usually are given

the task of enforcing the curriculum requirements imposed by statute and state regulation. In several states county superintendents have been given the authority to enforce curriculum requirements. Local boards in turn have the authority to enforce curriculum requirements against their employees.

k. Authority to determine and enforce curriculum in private schools. Typically it is the state legislature which established certain minimum curriculum requirements which private schools must also follow. In some states, in effect, control over the private school curriculum has been delegated to local boards of education insofar as the curriculum in the private schools must be "substantially equivalent" to that available in the public schools. In these states local officials have the authority to determine if the private schools are meeting the required standards. If they are not, the method for enforcing the requirements is to bring a charge against those parents of children in private schools who are failing to meet the compulsory attendance requirements of the state.

l. Authority to determine the political bias of a course or program. The state legislature often places a thumb on the scale by prohibiting the advocacy of communism in the public schools, by imposing the requirement that schools offer a pro-American or pro-U.S. Constitution viewpoint, by a requirement that instruction in the evils of communism and the benefits of the free enterprise system be given. State boards have not gotten deeply involved in this area except in Arizona where there was a strong effort on the part of state officials to enforce a particular political viewpoint and shape the bias of history courses. Typically the choice of political bias is left to the local district. The range of choice open to the local district, however, has been narrowed by the state statutes just discussed. Hence we might conclude the choice has been reduced

to choosing among viewpoints generally taken to be acceptable.

m. Authority to choose the method of instruction. If there is one area of the school curriculum that seems to have been left entirely in the hands of the local district, that is the choice over methods of instruction (excluding the question of the selection of instructional materials.) Only in Arizona did we find a concerted effort on the part of state officials to try to control instructional methods; in that case a group came close to imposing as a criteria for the selection of reading materials that all materials rely upon the phonics approach to the teaching of reading. This instance apart, districts typically are left with the choice of choosing between such methods as critical thinking and rote memorization. They may choose the form of grading system they will use; they may choose to teach the old or new math; they may choose between various methods of instructing in reading. To what extent the superintendent, principals and teachers get involved in these decisions will vary from school district to school district. Courts might be asked in the future to examine the methods chosen by local districts but it is unlikely court intervention, if it occurs at all, will be very extensive.

n. Authority to decide whether to indoctrinate pupils. This authority seems to be but part of the larger question of authority to choose the method of instruction. (Some may quarrel with this last statement because of their definition of "indoctrination.") But again the choice seems to have been left to the local district. Here, however, it is more likely that there are limits not yet articulated and defined which a district ought to be wary of transgressing. Occasionally state agencies will say local districts must be politically neutral, hence there is a suggestion that state authorities may limit the extent to which local districts may indoctrinate.

o. Authority to acculturate pupils. There seems little doubt that local districts have been left the authority to decide how to and whether to acculturate their pupils in the dominant culture of the community. For a long time it has been assumed local districts could impose the dominant white culture on minority pupils. Now new questions have arisen: how far may boards in the political control of minorities use their power to impose their culture on minority and white students? May boards in the control of whites impose their culture on minorities? May whites require white students to become familiar with minority cultures? These questions have been left to the political processes, but we may anticipate future cautious attempts to deal with them legally.

p. Authority to establish pupil classification schemes. In all the states studied, the legislature has played an important role in establishing a wide variety of pupil classifications. Typically the legislature has established schemes in terms of special educational needs and/or minority status. What the legislatures have usually left to the local boards is the establishment of classifications among pupils that exhibit no special needs except that they fall within the normal ranges for achievement and aptitude. That is, local districts have the authority to establish ability grouping and tracking systems for the so-called "normal" pupils. Authority to establish such pupil classification schemes carries with it the further implied authority to provide a differentiated education for different pupils.

q. Authority to classify the individual pupil. The state legislature in several of the states studied, along with granting local districts authority to classify individual pupils, established certain procedures which must be followed. Extensive procedural schemes are to be found in California and

and Massachusetts. This authority to decide which program an individual student should be placed in might be viewed as one of those "administrative details" which has been left to the local districts for determination.

r. Authority to grant pupils exemptions from courses and programs. The most far reaching exemption is that which exempts a child from school altogether. The legislatures in all states have provided for this by authorizing local districts to exempt pupils against the will of their parents from the public schools on the theory these pupils will not benefit from the public school program. Such exemptions must be carried out in accordance with the procedural requirements set forth in the statutes. Legislatures also have required local districts to exempt pupils from certain courses if the pupils and their parents seek such exemptions on religious grounds, e.g., exemptions must be granted from certain health and sex education courses. Beyond this, exemptions can be granted in certain states to pupils who "test out" of a course, i.e., show they have mastered the material in the course by taking a test. This sort of exemption is not widely used by the states studied and is limited, when available, only to certain courses. None of the states studied allowed pupils to "test out" of high school. Only in California was judicial precedent found for the proposition that a school must grant an exemption, in the absence of a statute on the question, to a pupil for a required course if the parent objects to the course.

s. Authority to evaluate the school program. Local districts have the implied authority to evaluate their own program. The new development is state laws requiring state agencies to establish state-wide testing programs. The adequacy of these programs for actually evaluating the school program is in doubt, but steps have been taken toward actual evaluation of

the entire public school program. Whether these early steps will actually develop into an effective evaluation system remains to be seen.

t. Authority to accredit schools. Whether it is called accreditation or not, state departments of education are the agency which have been given the authority to accredit individual schools in the state. Private associations are also involved in accrediting schools and in Florida the private association and the state department cooperate in the accreditation of the schools. Little of consequence seems to hinge on the accreditation process.

u. Authority to review actions of state and local agencies. In all states the courts are available to review the actions of the state and local agencies. There are differences between the states, however, as to the likelihood of a complainant obtaining relief from the courts. In New York the commissioner of education has been given by statute quasi-judicial authority to review complaints of aggrieved persons. His decisions pursuant to this power are in turn reviewable in the courts, but court relief is not easily obtained. In several of the states declaratory legal advice may be obtained from the State Attorney General. Such advice plays a big role in Arizona; schools in California and Florida also rely on this free legal service. In many instances the advice obtained has a direct bearing on authority to control the school curriculum.

8. With regard to many of the roles listed above, teachers and unions may also share some authority. Usually, however, this authority is not derived from a state statute, but is sub-delegated to the teacher by the school board or is obtained through bargaining at the bargaining table. Teachers and unions do not have a secure legal foothold with regard to control of the school curriculum. The same comment might be made with regard

to parents, students and taxpayers--except to the extent they may exercise influence through their ability to vote for state and local officials.

9. One of the purposes of the study was to gain a greater understanding of the meaning of the terms "centralized" and "decentralized." States were selected which represented examples of highly centralized and decentralized systems as well as mixed systems. One point that was learned in coming to terms with such labels is that one has to analyze a state's laws in terms of the allocation of roles discussed in point number 7. The allocation of those roles are the factors which determine whether one or the other label is appropriate. Thus, one might say that the more these roles are assigned to the state authorities, the more the state is centralized, and vice versa. Moreover, a given role can be analyzed in terms of whether it is held exclusively or is shared by the agency in whose hands we have said it rests. Thus, a state agency might play many of the roles listed above, but in each case that role may be shared with the local boards. Or, the agency might enjoy a small number of roles which it holds exclusively while all the others are exclusively held by the local district. The patterns of course can be quite diverse. Thus, labeling a state as centralized or decentralized must be done with great caution and sophistication. This is a problem political scientists must face when attempting to study the politics of states they want to label as centralized or decentralized.

10. A further insight is that even states we might want to label as decentralized are passing legislation which establishes state and local relations with regard to a particular program that are more centralized than anything heretofore existent in the state. For example, legislation dealing with handicapped and non-English speaking pupils usually reflects a state-local relationship that is more centralized than prior relationships

secure through its own actions its commitment to a right to an education, courts will be willing to take the legislature at its word with the result they may impose increasingly strict procedural requirements on school administrative efforts to deny or curtail a student's enjoyment of that legislatively created right. And as the legislatures create more special programs with tangled, vaguely written and potentially discriminatory elements in them, the more the courts will be called upon to clean up, interpret, and correct the work of the legislatures.

59. This prospect for increased court activity is not without its problems insofar as the state court opinions we have reviewed -- especially the lower state court opinions -- are often themselves examples of how the law should not be written. These courts often render unclear, confused, and inarticulate opinions which leave as many problems in their wake as they clear up. That in itself is likely to spawn more suits and more paper.

60. One possible solution to some of the inadequacies in the handiwork of the courts, as well as a way of assisting the courts with their workload, is the adoption of an administrative procedure act applicable to local schools and the state educational agencies. Florida has adopted such a law. It provides for administrative hearings as a preliminary way of resolving many possible policy decisions. Perhaps implementation of such procedures would lead to settlement of the dispute or at least establish a sufficiently sound record that the courts' work would be facilitated.

VIII. Concluding Observations

If there is any central message to be derived from the five studies, it is that control of the school curriculum is shifting -- even in the so-called

decentralized states -- away from the local board of education, but that this shift has not presaged an increase in parental authority to control the curriculum. The shift has been to the state legislature, to state agencies and to an extent to teachers' unions. In the long term increased authority will naturally be exercised by the courts as well. Perhaps the most important of these developments has been the extent to which the state legislatures have become involved in legislating the school curriculum: new courses have been ordered to be taught and taken; an enormous system for classifying pupils has developed under legislative guidance; finance and budgeting laws have been drafted in such a way that they touch upon and affect local control of the curriculum (see Florida and Arizona studies); the legislatures have attached anti-discrimination requirements to the selection of instructional materials; state laws increasingly are embodying references to output standards; the legislatures have adopted state-wide testing programs which have implications for the curriculum in the schools; and the legislatures in several states have moved toward the use of the categorical grant-in-aid device to control the school program. Even in a state such as Massachusetts which is markedly decentralized, the legislature has imposed a mandatory requirement that local districts provide bilingual instruction to those pupils eligible for such programs. All these developments, of course, have been piled on top of the older statutes imposing yet other requirements on the local districts.

These restrictions on the discretion of the local board of education are, however, only the beginning of the story. There is an already vast body of cases interpreting the U.S. Constitution which has a bearing on the control of the curriculum. (See for example the following: Tyll van Geel "Constitutional and Philosophical Perspectives on Political Education in the

Public Schools," (a report written under this contract from N.I.E.); Tyll van Geel, "The Right to Be Taught Standard English: Exploring the Implication of Lau v. Nichols for Black Americans," 25 Syracuse L. Rev. 863 (1974); David L. Kirp, "Schools as Sorters: The Constitutional and Policy Implications of Students Classification," 121 U. Pa. L. Rev. 705 (1973).) These developments touch upon such issues as religion in the public schools; the teaching of Darwinism; flag salutes; the barring of certain subjects from the curriculum by law; fairness in the presentation of materials in school; the classification of pupils; academic freedom of teachers; the exclusion of certain books from the school by school boards; free speech of students and the school as a market place of ideas; sex discrimination in schools in the assignment of students to courses and the exclusion of students from courses; the testing of pupils; the provision of special programs for black students only; and the provision of bilingual-bicultural education.

Beyond these constitutional developments the Civil Rights Act of 1964 has recently been interpreted to require the provision of special English language instruction to those pupils who are excluded from effective participation in the school program by reason of the fact they lack the requisite English-language skills to understand the all-English school curriculum. (See Tyll van Geel, "The Right to Be Taught Standard English: Exploring the Implication of Lau v. Nichols for Black Americans," 25 Syracuse L. Rev. 863 (1974).) And while the Department of Health, Education and Welfare has recently declined to interpret the Civil Rights Act of 1964 to attach to problems of racially and sexually discriminatory curriculum materials, the possibilities of an extension of the Act to this area has not been forever foreclosed. Beyond this the various federal grants-in-aid have their own special impact

upon the school curriculum -- especially Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 241).

In short, the public school curriculum has become the subject of an enormous body of law and it does not appear that the growth in the law in this area is going soon to abate.

In striking contrast to the increased number of laws and regulations within which the local school board must operate, the private schools in these states as a legal and practical matter are virtually left alone. Private schools in these states do not have to register; in reality to even undergo periodic inspections. In a state like Florida state officials know virtually nothing about the private schools of the state and in New York where there is presumably a mechanism for controlling these schools, it is, as a practical matter, unused. (Private schools that wish to incorporate in the states must, of course, comply with incorporation requirements; out of state corporations that wish to do business in the state also must comply with state laws; and commercial schools tend to be subject to greater state regulation.)

What accounts for this strikingly different treatment of public schools and private schools is not easily uncovered and goes beyond the scope of this study. However, some final comments on this point are in order. First, perhaps it is fear that to regulate private schools would raise complex constitutional issues, especially with regard to the rights of free speech and free exercise of religion as protected by the First Amendment. Second, the smaller number of private school students and private schools compared to the number of public schools and public school students may have led policy makers to conclude that real regulation of the private schools is not worth the costs. Third, perhaps it is felt the "free market" nature of the private school system is such as to

cure any problems that might exist: if parents do not like what a private school is doing they need only withdraw their child, send him or her to another private school or to the public schools. Fourth, there have been few, if any exposés of non-commercial private schools revealing any sort of a problem that needs to be corrected -- any kind of wide-spread fraud, for example. (Commercial vocational schools were the subject of an expose in Massachusetts by the Boston Globe in the spring of 1974.) Fifth, the increasingly-wide-spread notion that children have a right to an education, i.e., a claim against the state for a minimally adequate education, has impelled the legislature to make sure that this right is realized and that local boards of education out of indifference, an excessive zeal for minimal spending or malice, not short change certain groups of pupils. This last point is buttressed by the wide-spread bad publicity to which the public schools have been exposed: this publicity has revealed that many local boards have not fulfilled the notion of a right to an education. Thus we might say that in the long term the most profound development that has affected and will continue to affect control of the school curriculum is the growing recognition of a right to a minimally adequate education. This belief -- often not explicitly articulated -- has led legislatures to seize the initiative with regard to the school program, to increase their own control of that program. But it has not led them to conclude that, for example, parents ought to be significantly involved in formulating that program. In other words, in reaching toward a way for better realizing the right to an education, legislatures have tended to concentrate on reforming the substance of the curriculum and not the processes by which curriculum is formulated. As we have seen, state constitutions do not stand in the way of reforming the processes by which curriculum is formed, hence

this sort of strategy remains available for legislatures to try. Whether such a strategy will in fact be attempted, however, seems doubtful in an intellectual climate in which most everybody concentrates upon end results (student achievement) to the neglect of processes of decision-making.

established by the legislature. Within a given state one can find different kinds of state-local relationships with regard to different kinds of children--mentally and physically handicapped; non-English speaking; vocational students; elementary school pupils; and high school pupils. As a general proposition we might say that one is more likely to find increased state control the more the student is likely to be neglected by the local district and/or the more the state thinks that a program must meet certain minimum standards, as with the case of elementary school pupils.

11. Further, we conclude a state may be centralized in two different senses. In one sense, a state is centralized if the legislature itself has taken on several of the roles outlined under item number seven. Under this scheme, other things being equal, the state agencies may have few roles to carry out, but the local district may be given the basic role in the system subject to the constraints of the state legislature. A state might also be termed to be centralized when many roles have been given by the legislature to the state agencies; these roles the state agencies may share with the localities or hold exclusively.

12. States which we may want to label as centralized in the second sense of the term tend to reflect the following features. In those states the legislature and/or state constitution has given to state agencies the authority to select educational materials for the local districts; to establish minimum standards for the school program; to veto courses proposed by the local districts; and/or to have quasi-judicial authority to review complaints with regard to the local districts. Additionally, the newly created authority to establish state-wide testing and evaluation has increased the authority of state agencies. States which have most of these features are Arizona and California. Florida's state agencies exercise some of these

roles--textbook selection and setting of minimum standards. In New York the Board of Regents has "legislative" authority over the system and the commissioner enjoys quasi-judicial powers. To what extent these powers have been exercised in the states is a separable issue.

13. (a) It was also found that even in the states we may wish to label as centralized in the second sense of the term, total centralization has not taken place. Local districts share in most of the roles given to the state agencies but there are many roles given exclusively to the local districts, subject only to the constraints of the state legislation under which they operate. Furthermore, even when the state agencies have been given as important a role as the selection of instructional materials, that law is often designed in a way to discourage total state control. For example, in Florida local districts are to have an important influence on the books ultimately selected by the state agency. In California, the state agencies are expected to select a range of books to assure some choice at the local level.

Provisions exist for seeking exemptions from state statutory and regulatory requirements. And in California several statutory provisions open the door to the local district simply ignoring state statutory and regulatory requirements with regard to certain children; the legislature deliberately seems to have allowed the local districts a free hand with certain classifications of students.

(b) However, even in those states we might wish to characterize as decentralized, total decentralization has not taken place. If decentralization can mean that in their sphere of operations the local districts are independent of the state, are not subject to state constraint, intervention or review, then we must conclude that decentralization even in this limited

sense nas not taken place. In all the states the potential for state review remains; the threat of preemption always exists; and in many instances the local districts are subject to direct control by the states.

(c) In short, all the states studied were mixed systems and the differences were matters of degree and style. Local control over curriculum in some pure sense of the term was not found to exist; but neither was state control predominant.

14. If there is a central difference between those states we might call "centralized" in the second sense of the term it is that the authority granted to the state agencies leaves open the possibility of exploitation by groups which may "capture" these agencies. Centralized authority makes it possible for a group which gains control of the state agencies to read the law for all it is worth in order to put its imprint on the content of state regulation and to increase the scope of state agency control. The studies of Arizona and California show that these legally sanctioned opportunities do not go neglected. However, attempts to extract the maximum possible authority from the existing laws generally have been unsuccessful because they have been opposed by powerful counter reactions. Centralization seems to generate cycles of more or less state influence over the curriculum. The state politics of education with regard to the curriculum tends to be less tumultuous in the more decentralized states. Conflict in these states is more or less permanently confined to and isolated in the local districts. However, we cannot say that one general pattern of conflict management is superior to the other--such an evaluation depends upon many factors. Some of these factors are discussed in the context of specific problems in the Arizona chapter under the politics of textbook selection and the case of the implementation of the curriculum package called "Man: A Course of Study."

15. Except for the occasional attempt to impose a particular political or moral point of view upon the localities or to impose, as occurred in Arizona, a particular theory of the teaching of reading, state agencies with curricular authority have not attempted fully to exercise that authority. Most importantly, the state agencies have not attempted to exercise their authority to mandate minimum educational requirements. States have confined the vigorous exercise of these powers to driver education and physical education. Even the minimum requirements promulgated by the states with regard to the education of the handicapped are very minimal. Thus, if the power to establish minimum educational standards today were withdrawn from the states studied, it is clear that the impact upon the operation of the educational system would be minimal. It can be concluded that state agencies tend to have more formal authority than they generally exercise with regard to the content of the school program.

16. State agency impact on the curriculum occurs largely other than through rule making. The most direct impact occurs in those states in which instructional materials are selected at the state level. Next, on occasion those state agencies with the power of prior approval of courses proposed by the local district, will veto those courses, e.g., in California the state department has refused to let local districts substitute band for physical education as a credit toward graduation. Influence is exercised through the control of the various grant-in-aid programs that have been established by the state legislature. Indications here are that influence comes through the ability to decide who will get a grant and in negotiating with grantees over aspects of their proposals. In New York, influence is exerted through the control of the content of the so-called Regents' examinations which students take in order to obtain "Regents' Credit" toward obtaining a "Regents' Seal"

on their graduation diploma. In those states like Florida and California which have moved toward state-wide assessment of pupils for purposes of program evaluation, state influence over the curriculum can occur through the selection of the test items used in the tests, and through determination of what constitutes a satisfactory achievement of an objective. (Determination of actual objectives to be tested has been a political process which the state agencies have not dominated.) And in New York, on occasion, the commissioner in his quasi-judicial capacity has the opportunity to rule on a question involving the local curriculum. Here again, however, restraint on the part of the commissioner has resulted in a minimal state impact on the curriculum.

17. What state influence over the curriculum means in reality is that the state laws establish a framework within which a constant colloquy takes place between state and local agencies. Consultation over the approval of courses; the selection of materials; the granting credit for this or that experience obtained outside of the regular school program; the selection of materials; the categorization of materials as "basic" or "supplemental"; the reasonableness of not doing this or doing that; and the design of programs funded by state grants in aid are among the subjects of that colloquy. How much of an impact the state agencies have depends upon other factors beyond the laws: the attitude of state officials; the size of the state agency budgets; the efficiency with which state agencies operate; and the ratio of state agency personnel to the number of school districts in the state.

18. Also of importance is whether or not the state board and/or the chief state school officer are elected officials. The fact of being

elected can cut two ways: on the one hand, such officials may feel constrained because of the need to appeal to a diverse state audience; on the other hand, elected officials may feel they represent one constituency, one point of view which they will then try to impose upon the rest of the state. This latter phenomenon was most clearly illustrated by the tenure of Superintendent Max Rafferty in California. In Florida the chief state school officer is elected, but traditionally the person occupying that role is viewed as an educational statesman and is expected to be above politics, i.e., he is largely an inactive figure. The picture in Massachusetts with the establishment of a Secretary of Education along with a chief state school officer, in the more traditional sense of the term, presents a confusing picture. The Secretary of Education, because of his close ties to the Governor, is probably the more political of the two officers.

19. If in reality there appears to be less centralization in the second sense than meets the eye, the extent of centralization in the first sense (see item 11 above) has been an increasingly important phenomenon. California represents the high water mark of centralization in this sense of the term. In that state, the legislature has been very active in spelling out what courses must be offered and/or taken. Indeed, the legislature has been sufficiently active in spelling out the basic educational program of the state it would be surprising if there was much room left in the school year, month, week or day to add many additional course offerings. And, if anything, there has been a tendency upon the part of all state legislatures to add to the list of courses that must be offered and/or taken. We also discovered that in both Florida and California the legislature has inserted itself in new ways into the policy-making processes of the state agencies.

20. It was not possible to determine any overall clear and consistent theory which explained why authority was allocated as it was in a given state. The general impression left by the five studies is that the allocation of authority between state agencies and local districts proceeds on an ad hoc basis and is influenced by the political pressures that happen to prevail at the time the legislation was under consideration. Despite this lack of a clear theory which one, through inductive analysis, can uncover in the legislation, some comments about what seems to lie behind the allocations of authority in the states are warranted. Basically, it might be said that all states are committed to local control of the program offered in the public schools. This is made clear by the fact that no state was found in which total control of the school program was taken over either by the legislature or delegated to state agencies. Some states such as Massachusetts have maintained their commitment to local control more than others. To the extent the states have departed from local control and delegated authority to state agencies, or controlled the program directly through state legislation, the reasons appear to be multiple. First, some matters were considered so fundamental that it was deemed important that no district be allowed the option of not offering these courses, e.g., all districts must teach English, arithmetic, American history. Second, to protect children and parents against the "lazy" district state officials were given the power to promulgate minimum standards. (Minimum standards can become maximum standards as well.) Third, to allow for the possibility that a given district may act irrationally or wastefully, state agencies were given the authority to veto proposed courses before the local district could actually offer them. Fourth, authority to select educational materials was given over to state agencies in three states--partly because of distrust of the competence of the local districts, partly to assure some degree of uniformity in the state-wide educational program, and in part because large purchases of materials by the state would

be less costly than several smaller purchases by the local districts, and in part because the state can exercise such economic power in the textbook market it can actually bargain with textbook manufacturers over the content of the textbooks thereby further enhancing state control over the school curriculum. Fifth, state agencies were given specific authority with regard to certain programs designed for minority and handicapped students because these students traditionally have been neglected at the local level. Sixth, state agencies occasionally were given the authority and duty to specify the content of particular courses because the legislature has determined there is an urgent social problem and it wants to make sure it will be dealt with in the public schools--a problem that would require constant up-dating of course content so it would be impractical to legislate by statute the content of that course. Seventh, state agencies were given authority to administer certain grants-in-aid because it was felt local districts cannot be trusted to use the grants for achieving the purposes the state legislature had in mind.

21. All the above may be good reasons for giving authority to state officials but as the study of Arizona in particular demonstrates there are dangers in giving extensive authority to state officials: namely, the authority can be captured by a group with a strong ideological or theoretical commitment. State authority may be used to cut into the basic state commitment to local control. Thus, a legislature which wants to maintain local control of ideology and bias and the choice of theories of the curriculum, must be careful in drafting laws which give authority to state agencies. The legislature must be alert to proposed statutory language and to suggested institutional arrangements which could become the means for accomplishing unintended extensions of state agency control. The legislature which wishes to achieve

its purposes yet retain local control over matters of ideology and academic theory must carefully constrain and define the authority of the state agencies, and/or design the processes for selecting state officials so as to guarantee the people who come into power will represent diverse points of view.

22. It is clear from the study that the states have evolved a variety of ways through a variety of mechanisms for shaping the colloquy between state and local agencies. The quasi-judicial powers of the commissioner in New York represents one device by which policy can be made on a case-by-case basis. Once a clear rule emerges from the cases, then it can be annunciated as a rule and imposed case by case. Florida has adopted an administrative procedure act which applies to schools and it provides another framework for relating the participants to each other. Arizona, California and Florida have all adopted procedures for statewide selection of instructional materials, but each state has designed the selection processes differently. California has provided for prior approval by the state board before local districts may adopt new courses. Florida has through its new educational finance law placed additional constraints on the localities with regard to how state aid may be used for mounting the educational program. The use of state grants-in-aid provide yet a different framework for state-local relations. What seems clear is that some of these devices are more prone to abuse than others absent careful design of their structure. For example, the quasi-judicial powers of the New York Commissioner if not exercised with restraint (as past commissioners have done) could lead to overweaning state control. Similarly, designing of the state textbook selection law needs to be done carefully if state control, to an extent not desired or anticipated, is to be avoided. The Arizona law, for example, has allowed for such abuse and before being amended Florida permitted abuse too. (It

might also be noted that these state-wide textbook selection processes need to be designed in ways so as to avoid conflict of interest difficulties, and ex parte communications which in turn can lead to corrupt practices.)

23. One way of constraining the exercise of state power would be through the careful design of the institutions at the state level. New York provides one example: both the state board and the commissioner have been given enormous formal power, but perhaps because both are appointed and tied to the legislature through the appointment process (the legislature appoints the Board of Regents and the board in turn appoints the commissioner, who is removable at the will of the board) these agencies have not exercised their full power. They apparently feel constrained by the legislature; and perhaps because they are appointed rather than elected feel some reluctance to impose their own will upon the local districts. Massachusetts and Florida represent other examples of institutional design at the state level that seem not to have led to the kind of turmoil and grabs for power that occurred in Arizona and California. It is important to note, however, that in both Arizona and California the attempts to impose particular viewpoints on the localities fell short of their goals but left a lasting imprint. If the systems in those states are, thus, to be faulted, it is for establishing arrangements which tempt people to seek more power when it appears this is not what is desired in the state. This sort of conflict is simply a waste of energy; it would have been better if the conflict had never occurred.

III. Role Allocation by the State Legislature: Relations Within the Local District

24. If local board control of the curriculum ever existed in some significant sense of the phrase, that day has passed for all the reasons discussed above and for the reasons to be discussed below. Local boards

are increasingly being constrained by legislative enactments; by new powers given to state agencies and by steps taken by the legislature to make sure local boards involve new participants in the decision-making process. Additionally, as more legislation with regard to the curriculum is placed on the statute books, the possibilities of obtaining court review and intervention in school affairs increases.

25. The most significant development with regard to the broadening of the participants in the curriculum decision-making process at the local level is the recognition given in state law to the teachers' union. California law is the most explicit in granting teachers the right to consult and confer with school boards over procedures for establishing the school program. The law of the other states with regard to which subjects which are mandatory topics of negotiation tend only to refer to "terms and conditions of employment" but unions are placing steady pressure on local boards to negotiate such items as class size, student discipline, the classification of pupils, the hiring of subject specialists and procedures for the establishment of the school program. Obviously, the more teachers win in the legislature, in the courts or at the bargaining table, the right to bargain over curriculum, the less discretion there will be in the local board to decide these matters. And, boards of education may be tempted in a period of tight finances to bargain away items dealing with the curriculum in order to gain concessions on salaries and fringe benefits.

26. As individuals, neither principals nor teachers have been given special statutory authority with regard to the curriculum. To the extent these employees of the system do play a role in decisions on the curriculum it must be as a result of the delegation of authority by the school boards.

27. Superintendents in two of the states we studied do enjoy a special statutorily created role with regard to decisions on the curriculum. In New York, in the larger districts the superintendent by statute has the responsibility of recommending policy on the curriculum to the school board. And in Florida, because the local superintendent is an elected official and because the state statutes structure an unusual one-sided relationship between him and the local board, the superintendent as a practical matter probably has considerable control over the school curriculum. Chances are, however, that in all the other states the local boards delegate considerable authority to the superintendent to take the initiative in the formation of curriculum policy subject to the ultimate approval of the local board.

28. It is a fair general proposition that parents and students in the states we studied have been given no statutorily based authority with regard to formulation of general school curriculum policy. The kinds of involvement the legislatures have established by statute for parents has either been limited to participation on advisory boards or to participation in procedures initiated to establish how that parent's child should be classified. But even with regard to involvement in the classification of children only California and Massachusetts took a meaningful step toward parental involvement. And even then these states limited the parental rights to the contexts of special and bilingual education. Florida recognizes the right of parents to protest a decision by schools not to provide special educational services to the child. None of the states recognized by statute a parental right to be involved in the classification process when it involved the placement of a normal child in an ability group or track. The major exception to this general pattern of exclusion of the parent from the curricular

decision-making process is the Massachusetts law which permits, in high schools enrolling over 150 pupils, twenty parents or 5% of the student body to petition the local board for the institution of a course. With regard to that provision, it might be noted that real danger exists that active parents and students could abuse that opportunity, thereby forcing upon the schools a major shift in the expenditure of funds. A handful of parents could have a significant impact on the school budget and program. As a result, a question exists as to whether this law is not susceptible to being struck down under the doctrine prohibiting the delegation of public authority to private groups. Thus, while a law such as this is an interesting way of trying to assure the responsiveness of the school district to the demands of parents and students for new programs and courses, it would seem safeguards need to be built into the law to prevent its abuse. The study of Massachusetts suggests ways of narrowing the meaning of the law to preserve its constitutionality.

29. Parents and students are thus relegated to seeking involvement in curricular decision making by using various methods of political participation or by turning to the courts. As will be discussed below, the possibilities of obtaining an effective voice through the courts are today slim, but perhaps will improve in the future.

30. It was found that the possibilities for local districts of carrying on innovative programs even in the face of considerable state involvement in curricular decision making are real and cannot be said to be non-existent. State laws and state regulations do not provide school districts an excuse to avoid programs which depart from traditional patterns. In many cases, mounting such a program will engage the local district in a colloquy with state officials over the program as a result of the authority of state officials

to grant waivers with regard to certain laws and regulations, to grant permission to use non-certificated experts from the community, to review and give approval to programs and to the granting of credit toward graduation. But these entanglements with state officials need not result in the program never being introduced or adopted. If anything needs to be done in this area, it is to dispel the myth, which the local educators attempt to rely on to avoid considering new ideas, that state law and regulation stands insurmountably in the way of changes in the local program. Even in states that use state-wide adoption of instructional materials, the laws are drafted to allow for some maneuvering by the local districts.

31. In the long term, the slow movement toward the use of output measures in education may prove to be a significant factor in shaping the behavior of local school officials. The adoption of state-wide testing programs and the Florida and California movement toward the use of only learner verified instructional materials, and the concern of several state legislatures that only programs from which the students "may benefit" be adopted, are all manifestations of this trend. The impact of this movement already can be seen--local districts are shifting their attention and priorities to those programs in which students are tested by the state. Whether more or less innovation and experimentation will take place in those programs as a result of the testing is less clear. One might speculate that given a goal toward which to move, local districts might indulge in considerable experimentation to find the key that will produce the desired results. Another scenario would have the local districts reverting to rather conservative teaching methods, e.g., teaching to the test with rote memory work, simply in order to produce good results on the test. Probably both approaches will be used and which approach is used will depend on such legally exogenous

variables as the social-economic background of the pupils and the district's population as a whole.

IV. Role Allocation by the State Legislature: General Comments

32. Legislatures seem to have a penchant for drafting vague and confusing statutory codes which leave open numerous questions with regard to the scope of authority of the agency to which authority has been delegated. As a result, describing the actual legal relationship between the various participants in the decision-making process has required a considerable amount of legal analysis and speculation. Only in New York have many of these issues been taken to the courts for resolution. In the other states occasionally a question of this sort is taken to the attorney general of the state for his opinion. After that, the disputes that inevitably must arise necessarily must have been resolved between the parties themselves through informal political processes. The colloquy which state law forces the agencies of government into must include a discussion of their legal relationships, thus part of the cut and thrust of educational politics involves a legal debate with threats of legal action part of the arsenal of each of the parties.

33. Many of these confusions in the law seem unnecessary insofar as language can be more precisely used to spell out legal authority and relationships. Legislatures ought to take more care in the drafting of their statutes as in the long term this would result in a more efficient use of educational resources; less time and money would be wasted on trying to settle a legal dispute that could have been settled once and for all at the earlier stage of legislative adoption of the statutory code.

V. The Content of the School Program

34. The legislatures in all the states studied have adopted a very similar approach to actual specification of the curriculum itself. There are several parts to the approach: first, the legislatures have said that children must be exposed to a certain quantum of schooling as measured in years, months, and days. Secondly, the legislatures have said that during that time the schools must offer and the students must sit through certain "courses," and/or be taught certain "subjects." Thus the curriculum is legally describable in terms of such units as time, courses and subjects. This legal conceptualization of the curriculum imposes itself on thinking and constrains new ways of thinking about what school should be doing.

35. There is a great similarity in the basic program students must follow in all the states studied. If there are significant variations they tend to occur in the area of social studies. While all students are expected to study American history, the students in Arizona and Florida are expected to learn about the evils of communism and the benefits of the capitalistic system. In New York, students must study the benefits of the U.S. and State Constitutions. Massachusetts has little to say on this subject, whereas California provides a rather extensive list of specific items that must be covered in the social studies curriculum. Additionally, California requires that the social studies curriculum not adversely reflect on any minority group or women and that it accurately represent the contributions of both these groups to the history of the state and nation.

36. State legislation does not for the most part deal with such requirements as music, the fine arts, and the performing arts. These matters are left to the discretion of the local districts. California is the exception.

37. Increasingly statutory codes are being filled with requirements that courses be offered and undertaken with regard to particularly pressing

social problems: drugs, alcohol, conservation and the environment, fire safety, road safety and the like. These programs seem to reflect a faith on the part of the legislature that these social issues can be tackled through education; that the money and time spent on these topics are worth the benefits. An evaluation of this assumption might be of use in deciding if these requirements ought to remain in place and if additional requirements ought to be added.

38. There is a tendency on the part of legislatures to provide for more legislative control over the content of the elementary school curriculum than the high school curriculum.

39. One of the most striking features of the handiwork of the legislatures is the extent to which by statute the children of the states have been classified for purposes of providing different programs and courses of studies. As many as a dozen different classifications can be found in the statutory codes, with possibilities of further refinement taking place at the local district level. The legal question which arises with regard to these classifications is whether the classifications do truly mark off students who are different from each other and whether the benefits accruing the students included in one classification (hence excluded from another) outweigh the harm that can result from being stigmatized, and from being given a watered down program "suited to the student's capabilities." A related problem is the lack of adequate procedural protections and the lack of parental involvement in the decision to classify pupils. Further, there are inadequate protections to make sure that once a student is classified that the subject of his classification be re-opened periodically to make sure his original classification is still appropriate. It is important that legislation deal with many of these matters as there are strong possibilities

that the Equal Protection and Due Process Clauses of the 14th Amendment of the U.S. Constitution will not provide the protection that students need.

40. Considerable leeway is left to local districts to indoctrinate pupils politically. To the extent such political bias is not considered to be a proper part of the school curriculum, it would seem to be advisable on the part of state legislatures to adopt provisions which assure that a fair approach is taken in political education courses. Perhaps adoption of a rule equivalent -- but tailored for use in the public schools -- to the fairness doctrine imposed on the electronic media would be appropriate. (See the separate essay, "Constitutional and Philosophical Perspectives on Political Education in the Public Schools," by Tyll van Geel, which is part of this project.)

41. The problem of discriminatory instructional materials has been tackled by several of the legislatures studied. While such legislation is clearly warranted, there are problems with the statutory language. In many cases it is vague, self-contradictory and, as a result, almost impossible to enforce. No penalties are attached to the violation of these anti-discrimination prohibitions and no procedures are established for challenging instructional materials as being in violation of these provisions. These provisions in the statutory code need to be re-drafted.

42. The anti-discrimination requirements may collide with other new legislation which stresses the provision of bicultural education as part of efforts to provide non-English speaking pupils a bilingual education. Many of the cultures in the United States, for example, reflect rather traditional sex roles and a truly bicultural education would presumably reflect these social-sexual mores. However, the prohibitions against dis-

criminatory materials and the affirmative requirements that the contribution of women to the history of the country be accurately portrayed may conflict with the requirements of a bicultural education. Legislatures need to give some thought to this issue.

43. As a general proposition special legislation to protect the mentally and physically handicapped and the non-English speaking pupil tends to be poorly and confusingly drafted. For example, in New York the statutes dealing with the handicapped are so confusingly written that the courts literally have been unable to determine what the legislature intended. An important point of confusion arises in connection with the question of who is to share in the cost of educating the handicapped child. The code in Arizona with regard to bilingual-bicultural education is a mass of confusions and problems. New York's own code on bilingual education leaves it unclear whether such a program must be offered, if there are non-English speaking pupils enrolled in the schools, or whether the choice is within the discretion of the local district. Once again legislatures should take greater care in drafting new laws and in relating them to the existing educational code.

44. There is a considerable variance in the protection provided the handicapped and non-English speaking pupils in the states studied. Massachusetts has required districts in that state to offer a bilingual program to non-English speaking pupils whereas in Florida the statutory code is rather unclear as to the local districts' responsibilities. Similarly the protection of the handicapped varies from state to state. Since these children often tend to be slighted by local districts -- because of the cost involved in educating them -- state legislatures ought to take greater pains in drafting legislation to assure these children of an adequate education.

45. The requirement is in California and Florida that only materials which have been learner verified should be re-examined. It is doubtful that these provisions, as drafted, can be enforced or that any benefits will accrue from enforcement of the provisions. At the same time strict enforcement undoubtedly will increase the costs of the materials to the state and school districts. (Members of Harvard Graduate School of Education Seminar, "Quality Control for Instructional Materials" Legislative Mandates of Learner Verification and Implications for Public Education," 12 Harv. J. on Leg. 511 (1975)

46. Increasingly state legislatures are incorporating in the educational codes phrases which suggest they are moving toward the imposition of output criteria upon the local districts. Thus, for example, local districts have been told they must mount programs from which children may benefit; they must provide a program which permits development to the maximum potential; or they must offer programs which must ameliorate the handicapping condition; or the programs must be designed to fit the needs of the pupils; or they must prevent reading disabilities. And, with the adoption of state-wide testing programs educational objectives are being defined in order that they may be tested. In short, a glacial-like movement away from purely input oriented educational codes has begun. While there is much to be said about adopting output criteria, there are problems with what the legislatures have done to date. Often the criteria within a single educational code conflict or at least are not the same. The California code represents this sort of problem. Further, the criteria are not well defined, hence it becomes unclear as to whether they add anything to the statutes except confusion. Perhaps they open the door to state agency intervention to enforce a standard of its own choosing. The standards tend to make promises to the ear but break them to

the heart -- that is, they seem to impose duties upon local districts which ultimately are unenforceable through the courts. And these standards are imposed on top of an educational code which stresses the provision of educational inputs. Thus, the obligations of local districts are becoming increasingly unclear. If this sort of haphazard legislation continues, considerably confusion could result when it might have been avoided. One need only look at the problems New Jersey faces in trying to define its Constitutional provision requiring the legislature to provide a "thorough and efficient" system of education to appreciate some of the difficulties these general phrases can cause. (Paul L. Tractenberg, "Robinson v. Cahill: The 'Thorough and Efficient' Clause," 38 Law and Contemporary Problems 312 (1974).) There is no reason for the legislature to promote such problems by badly drafting legislation.

47. The emerging notion of a right to an education, as mentioned above (Item number 1), may develop in such a way as to have implications for the content of the school curriculum. If such a notion should fully develop that could convert curriculum law from a duty based system of law (local districts have the duty to provide and students have a duty to take...) to a goal based and perhaps even a right based system of law. A goal based system is one in which the law points toward the achievement of some objective such as a minimum level of student learning. A right based system would mean that students had a claim against the school system and the district would have the duty of meeting that claim. Stated differently, it would count in favor of a decision on the curriculum, that the decision was likely to advance or protect the educational interests of the child; it would count against the decision that it would retard or endanger those interests. And

since rights tend over time to expand in meaning, we would be placing, in time, our public school system in a very different posture than it now is in.

48. At one time the school curriculum was considered to be a matter wholly committed to the discretion of elected and appointed officials -- a matter not controlled by legal rules and doctrines. If there were any area of school administration that might be said to be the freest of legal restrictions, it was the control of the school curriculum. Now all that is changing as increasingly the legislatures lay down law upon law with regard to the school program. The slow accretion of the law has transformed the domain of curriculum law from one that is simple to one that has become quite complex. And as the concern with discrimination in curriculum materials, concern with the protection of special groups of children, and with fairness in the presentation of materials continues, the area will become increasingly complex and difficult. Perhaps the ultimate in legal problems will occur if and when the notion of a right to a minimally adequate education is adopted as part of our laws. We will then be thrust into such difficult questions as assessing the adequacy of particular programs with regard to student achievement.

49. An overview of the substantive provisions of curriculum law in the states studied reveals that this law rests on a variety of rather different approaches to education. The older statutory provisions stress equal opportunity -- the provision of similar opportunities to learn for all students, e.g., all students must be offered and take a course in American history. More recently we have seen a movement toward legislative imposition of output criteria on the local districts. Under this approach schools must be concerned with whether in fact children learn, not merely if they have been given the opportunity learn. In any event, both these approaches tend to view the child

in traditional liberal terms -- all children are the same regardless of race, culture or social background insofar as they are creatures capable of learning, or achievement. Distinctions based on race, alienage, culture or ethnicity are arbitrary and irrelevant and, if used, would be the height of irrationality. Now, however, with the development of the concern for bilingual-bicultural education and compensatory education, legislation has been placed on the books which runs counter to the overall thrust of curriculum law. Now students are to be classified in terms of their ethnic and cultural backgrounds. These differences have become relevant. The conflict between these approaches has not yet become severe but there is one point with regard to which there is an immediate problem: bilingual-bicultural approaches to education can lead to within school segregation of pupils. Furthermore, there is the additional question of whether non-minority students may, must, or should be placed in bilingual-bicultural programs. These kinds of issues may find their way into the courts.

VI. Control of the Curriculum in Private Schools

50. Perhaps the most surprising finding is that private schools in the states reviewed are virtually free of any meaningful state regulation. (This statement does not apply to commercial schools such as those offering to train people to be beauticians or to private higher education schools offering post-secondary degrees.) State regulation in these states, at its most rigorous, tends to be limited to requirements such as that found in New York -- the program in private schools must be substantially equivalent to that in the public schools of the area. But while this provision could have a significant impact on the private schools, the mechanism for enforcing the provision is such that the requirement largely goes unenforced: local superintendents have the

responsibility of investigating private schools and then prosecuting parents under the compulsory education law who send their children to private schools which violate the standard. Local officials are noticeably reluctant to carry out this role, especially with regard to the Catholic parochial schools. In any event, the extent of state regulation is even less in the other states we reviewed.

51. Several state legislatures have made it more difficult to teach the child in the home then to send him to private schools. State regulations on "tutoring" tend to be more demanding than with regard to an educational effort which can be deemed to be a "school." This kind of unequal treatment of the two forms of private education may raise constitutional problems.

52. It was not found that the neglect laws shed any light on the state's understanding of what constitutes an adequate education. Most states simply have defined the parental duty to provide a child with an education to mean satisfying the compulsory education requirements of the state.

53. New York and California provide parents of certain handicapped children the opportunity to obtain financial support to send their children to private school if it is determined that a suitable educational program is not available in the public schools. While these provisions in concept make a great deal of sense the design of these statutory schemes is flawed in several respects. The standards for granting or denying the request for tuition are unclear, and in California there are arbitrary limitations for different children on the amount of money available for an individual child with resulting inequalities. In New York the statutory scheme is drafted in such a confusing way it is almost impossible to determine which unit of government must pay out the tuition. These New York provisions opened the door to collateral attacks upon the adequacy of the public school program. Such suits in the future may

pose difficult problems for the courts. Only the California code addresses itself in a cursory way to the minimum standards the private schools must meet. This is a problem that warrants more attention.

VII. State Courts and the Curriculum

54. The variety of functions the state courts have and can play in the area of curriculum is surprisingly large:

a. Determination of such constitutional issues as challenges to legislation on the basis of the delegation and preemption doctrines.

b. Determination of the scope of authority delegated to educational agencies.

c. Settling claims that educational agencies violated somebody's civil rights.

d. Settling claims that the educational agency abused its discretion, that it acted arbitrarily and capriciously.

e. Interpreting statutes so as to resolve, if possible, apparent conflicts in statutory provisions.

55. Definition of the courts' functions is controlled in part by the state constitutions; in part by legislation; and in part by the courts themselves as they evolve doctrines to guide their own jurisdiction and the exercise of their powers. Not all state legislatures, however, have adopted legislation bearing upon the courts' jurisdiction and scope of their authority. When legislatures such as in New York have attempted to shape the work of the courts they have largely attempted to codify the common law of the subject. But the codification has tended to do more than simply place in a statute standards to be found in the cases. The codification has served to choose among competing trends in the common law and to clarify points that the cases

left unclear. It thus seems on balance to have been a useful development for legislatures to enact legislation with regard to the jurisdiction of the courts and their scope of review.

56. Given the general functions of the courts, the courts may be called upon to adjudicate the following sorts of questions:

a. The constitutionality of delegations of authority to state and local boards of education.

b. Alleged violations of the civil rights of individuals.

c. Allocations of authority between state agencies; between state agencies and local boards; between local boards and local employees; between local boards and parents and students.

d. The exercise of discretion by local boards with regard to such non-constitutional questions as: selection of courses; teaching methods; classification of pupils; political indoctrination; the acculturation of pupils; discriminatory educational materials; the failure to provide certain educational services; the granting upon parental requests exemptions for pupils from required courses; claims of academic freedom based on interpretations of state statutes; the establishment of special teaching and administrative posts with special qualifications attached; the assignment of teachers to teaching responsibilities; the imposition of curriculum related requirements on local districts by the state agencies; and the subjects which are mandatory subjects of negotiations.

e. The interpretation and meaning of such new requirements as the requirements barring materials from the public schools which adversely reflect on minorities and women.

f. Cases leading toward and touching upon the concept of a right to an education.

57. Although courts potentially could play an enormous role in affecting curriculum law, to date that potential has not been realized in most of the states we studied. (New York is an exception: New Yorkers appear to be more litigious than the citizens of other states and either as a result, or as a cause, courts have played a larger role in shaping curriculum law in New York than in other states.) Courts have been loath to move too quickly into the areas outlined in item 56(d) above. This reluctance is manifested by adherence to standards of review which discourage court intervention and in continued adherence to the older common law understanding of the proper function and use of the writ of mandamus. Rules of standing, however, do show signs of becoming more liberal and the courts seem to have played down such doctrines as the requirement of exhaustion of administrative remedies.

58. The long term prospects for increased judicial involvement in the formation of curriculum law, however, are of a different character. If we can assume that each new piece of legislation changes or adds to the legal problems that may arise and be taken to the courts, then we can expect increased court involvement with the increase in legislative activity. The new anti-discrimination requirements will invite court activity and involvement. As the legislatures increasingly require the provision of courses "from which students may benefit," premises are being laid for tackling the adequacy of the school program on non-constitutional grounds. As notions of a right to an education ripen in the hands of the courts, and as legislatures increasingly seem to pass legislation which may fairly be read to be a legislative effort to fulfill that right, courts will be encouraged to read these statutory provisions for all they are worth so as to extend their benefits to as wide an audience as possible. And as the legislature makes more